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United States
Circuit Court of Appeals

For the Ninth Circuit.

MICHAEL GEORGE,

Plaintiff in Error,

vs.

MRS. GEORGE MEYERS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

Filed

JUL 21 1916

F. D. Monckton,
Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit.

MICHAEL GEORGE,

Plaintiff in Error,

vs.

MRS. GEORGE MEYERS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,
Plaintiff and Defendant in Error,
vs.

MICHAEL GEORGE,
Defendant and Plaintiff in Error.

Names and Addresses of Attorneys of Record.

GUNNISON & ROBERTSON, Juneau, Alaska,
Attorneys for Plaintiff in Error.

A. H. ZIEGLER and Z. R. CHENEY, Juneau,
Alaska,
Attorneys for Defendant in Error.

*In the District Court for the District of Alaska,
Division Number One at Juneau.*

CASE NUMBER 1277-A.

MRS. GEORGE MEYERS,
Plaintiff,
vs.

MICHAEL GEORGE,
Defendant.

Complaint.

Comes now plaintiff and for cause of action
against defendant herein alleges:

I.

That plaintiff and defendant are residents and in-

habitants of the town of Douglas, Territory of Alaska.

II.

That between October 18, 1909, and December 21st, 1911, the plaintiff, at defendant's special instance and request, performed services for defendant; that defendant agreed to pay plaintiff a reasonable compensation for said services; that said services so rendered to defendant by plaintiff consisted of cooking for defendant, attending to his room, doing his laundry work, sewing, and in performing the duties of a general housekeeper for defendant.

III.

That said services so performed by plaintiff for defendant were reasonably worth the sum of \$390.00.

IV.

That defendant has not paid the said sum of \$390.00, nor any part thereof, with the exception of the sum of \$72.50, and that there is now due and owing plaintiff the sum of \$317.50, together with interest thereon from December 21st, 1911, at the rate of 8% per annum. [1*]

For a second cause of action against defendant, plaintiff alleges:

I.

That on October 18, 1909, one George Meyers, the husband of plaintiff, and defendant entered into a partnership agreement, whereby they agreed to conduct a general mercantile establishment in the town of Douglas, Alaska; that said George Meyers was

*Page-number appearing at foot of page of original certified Record

then the owner of a store suitable for said business, and agreed and stipulated with defendant to use said store for their partnership business, in consideration of which defendant agreed and promised to pay to said George Meyers, as defendant's portion of the rental of said building, the sum of \$15.00 on the 18th day of each and every month during the continuance of said partnership business; that under and pursuant to the above agreement defendant occupied said building for a term of 26 months; that defendant's share of the rental for said store under and pursuant to said agreement above mentioned amounted to the sum of \$390.00; that at the time of final settlement of said partnership business, to wit: On December 21st, 1911, it was agreed and ascertained by and between George Meyers and defendant, that defendant's portion of the rental for said building amounted to the sum of \$390.00; that defendant at said time promised and agreed to pay said amount as his share of the rental of said store; but that ever since said December 21st, 1911, defendant refused, failed and neglected to pay said sum of \$390.00, and has not paid the same, nor any part thereof, with the exception of the sum of \$45.00.

II.

That there is now due and owing said George Meyers from defendant the sum of \$345.00, together with interest thereon from December 21st, 1911, at the rate of 8% per annum.

III.

That on the 7th day of May, 1915, said George Meyers, for good and valuable consideration, did

assign, set over and transfer unto [2] plaintiff the above demand, amounting to the sum of \$345.00, together with interest thereon from December 21st, 1911, at the rate of 8% per annum, and that plaintiff is now the lawful owner and holder of said claim.

WHEREFORE: Plaintiff prays for judgment against defendant:

FIRST: For the sum of \$317.50, together with interest thereon from December 21st, 1911, at the rate of 8% per annum.

SECOND: For the sum of \$345.00, together with interest thereon from December 21st, 1911, at the rate of 8% per annum.

THIRD: For plaintiff's costs and disbursements herein expended.

Z. R. CHENEY and
A. H. ZIEGLER,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Mrs. George Meyers, being first duly sworn, on oath deposes and says:

I am the plaintiff in the above-entitled action, have read the foregoing complaint, know the contents thereof and the same is true as I verily believe.

MRS. MYERS.

Subscribed and sworn to before me this 13th day of May, A. D. 1915.

[Notarial Seal]

A. H. ZIEGLER,
Notary Public for Alaska.

My commission expires July 3, 1917.

Filed in the District Court, District of Alaska,
First Division. May 17, 1915. J. W. Bell, Clerk.
By J. J. Clarke, Deputy. [3]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Answer.

Comes now the above-named *plaintiff*, and, for answer to plaintiff's complaint, alleges, admits and denies as follows, to wit: Answering plaintiff's first cause of action,

I.

Defendant admits paragraph I of plaintiff's first cause of action.

II.

Defendant denies paragraphs II, III, and IV, of plaintiff's first cause of action, and each and every allegation contained in each of said paragraphs.

Answering plaintiff's second cause of action,

I.

Defendant denies paragraph I of plaintiff's second cause of action, and each and every allegation therein contained, save and except defendant admits that he and one George Meyers, the husband of plain-

tiff, on or about November 1, 1909, entered into a partnership agreement whereby they agreed to conduct a general merchandise establishment in the town of Douglas, Alaska.

II.

Defendant denies each and every allegation contained [4] in paragraph III of plaintiff's second cause of action.

And as a further separate and affirmative defense and counterclaim defendant alleges,

I.

That between the 1st day of January, 1912, and the 1st day of March, 1915, defendant, at the special instance and request of plaintiff, and in the City of Douglas, Territory of Alaska, advanced to and loaned plaintiff the following sums of money, to wit:

\$50.00 on or about July 15, 1912, \$150.00 on or about January 20, 1915, and \$175.00 on or about February 1st, 1915, making a total of \$375.00;

II.

That plaintiff has not paid the same nor any part thereof, and that the whole thereof is now due and owing and unpaid to defendant from plaintiff.

WHEREFORE, defendant prays that plaintiff take nothing by her action; that defendant have judgment against the plaintiff for the sum of Three Hundred Seventy-five (\$375.00) Dollars, with interest at the rate of eight (8%) per cent per annum from the 1st day of March, 1915, and for his costs and disbursements in this action incurred.

GUNNISON & ROBERTSON,
Attorneys for Defendant.

United States of America,
Territory of Alaska,
Division Number One,—ss.

Michael George, being first duly sworn on oath, deposes and says: That he is the defendant in the above-entitled action; that the foregoing answer has been read to him and he knows the contents thereof; that the same is true as he verily believes.

M. GEORGE.

Subscribed and sworn to before me this 12 day of July, 1915.

[Notarial Seal] R. E. ROBERTSON,
Notary Public in and for the Territory of Alaska.

My commission expires June 19, 1917. [5]

Receipt of copy and due service of the within answer admitted this 13 day of July, 1915.

Z. R. CHENEY,
Attorneys for Plff.

Filed in the District Court, District of Alaska,
First Division, Jul. 13, 1915. J. W. Bell, Clerk.
By ———, Deputy.

[Endorsed]: No. 1277-A. In the District Court for the Territory of Alaska, Division No. 1. Mrs. George Meyers, Plaintiff, vs. Michael George, Defendant. Answer. Gunnison & Robertson, Attorneys for Defendant, 101-105 Decker Building, Juneau, Alaska. [6]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

CASE NUMBER 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MIKE GEORGE,

Defendant.

Reply.

Comes now plaintiff, by her attorneys, Z. R. Cheney and A. H. Ziegler, and for reply to defendant's answer, herein alleges:

I.

Replying to defendant's affirmative defense and counterclaim, plaintiff denies that between the 1st day of January, 1912, and the 1st day of March, 1915, defendant at the special instance and request of plaintiff, advanced and loaned to plaintiff the sum of \$375.00, or any other sum or amount whatsoever, except the sum of \$200.00, which amount defendant loaned to plaintiff on or about the 20th day of January, 1915; that on April 12th, 1915, plaintiff repaid said sum of \$200.00 to defendant.

WHEREFORE plaintiff prays for judgment as in her complaint prayed for.

Z. R. CHENEY and
A. H. ZIEGLER,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Mrs. George Meyers, being first duly sworn, on oath deposes and says: I am the plaintiff in the above-entitled action, have heard read the foregoing reply, know the contents thereof and the same is true as I verily believe.

MRS. MEYERS.

Subscribed and sworn to before me this 26th day of August, A. D. 1915.

[Notarial Seal]

JOHN HENSON,
Notary Public for Alaska.

My commission expires May 8, 1916.

Copy received and service admitted this 26th day of August, 1915.

R. E. ROBERTSON,
Attorney for Defendant.

Filed in the District Court, District of Alaska,
First Division, Aug. 26, 1915. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [7]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess the amount of her recovery at \$418.35.

FRANKLIN W. BUTTERS,

Foreman.

Entered Court Journal No. L, page 230.

Filed in the District Court, District of Alaska, First Division, Dec. 9, 1915. J. W. Bell, Clerk. By _____, Deputy. [8]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Decision on Motion for New Trial.

In this case defendant has moved for a new trial on the following grounds:

1. Misconduct of the prevailing party and her counsel.

I am entirely unable to see that there was any misconduct justifying a new trial. It is true that it was brought out, perhaps needlessly, that in 1911 the plaintiff had two children burned to death in a fire, but it is not reasonable to suppose that sympathy for

her on that account had anything to do with the rendition, four years later, of a verdict in an action in no wise connected with that lamentable occurrence—especially where the verdict could not possibly lessen the weight of such a blow as the loss of the children to the mother.

The prefacing of questions to witnesses, who had been excluded from the courtroom under the rule, by a recital of the substance of testimony given by other witnesses also under the rule, might have been grave misconduct if it had occurred in the examination in chief, but I think that on rebuttal it is permissible to call attention to the specific testimony to which the rebuttal is directed.

Persistence in the pernicious practice of asking leading questions was not more marked in this case than in dozens of [9] other cases tried here; and, too, whenever objection was made said questions were not allowed.

The asking of Maloof if he did not conduct a gambling house was proper; and besides, as the witness answered “no” and the matter was pursued no further, it is difficult to see how any prejudice could have resulted to the defendant.

The argument to the jury did not transcend the legitimate limits; the statement that the defendant was the “foxiest Syrian on Douglas Island,” and the picture of the interview between defendant and Mr. Hellenthal were not, it is true, sustained by the evidence, but it was not pretended that they *were based* on the evidence, and they were easily understood to be exaggerations and figments of the imagination.

The comment on the appearance and manner of testifying of Maloof was a legitimate subject of comment to the jury. While violent, indiscriminate and unjustifiable abuse may and ought to be checked, yet ridicule and sarcasm are not within the rule.

If any evidence was misstated, the time to call attention to it and seek correction was at the time of making the misstatements.

2. Surprise and variance, as to stated account.

As to this it is sufficient to say that no claim was made at the trial of any surprise or variance, and it is too late to urge any now.

3. Newly discovered evidence.

The newly discovered evidence relied upon is entirely cumulative. The issue in the case was whether or not the plaintiff performed the services; she produced witnesses to show that she had—the defendant produced witnesses to show that she had not. A new trial will not be granted merely because witnesses are later found who will testify to sporadic details which are in no wise inconsistent with the evidence upon which the verdict must have been founded. [10]

4. Insufficiency of the evidence to justify the verdict.

The ground relied on here is not that there was no evidence for the plaintiff, but that the plaintiff did not have a preponderance of the evidence. Plaintiff had witnesses as to the truth of all the material allegations of her complaint, and the defendant had witnesses denying the truth of those allegations, and all said testimony went to the jury. It was a simple case. There was nothing in it but

the credibility of witnesses. It is made the duty of the Court to instruct the jury that they are the sole judges of the credibility of the witnesses and the weight to be attached to their testimony, and that they should weigh the evidence and not count the number of witnesses, and that they should render a verdict in accordance with what they find to be the preponderance of the testimony. This is the law, and it would be idle to so instruct the jury if the Court is itself to override their judgment in any case where there is substantial evidence to support that verdict.

5. That the verdict is against the law.

Under this heading attention is called to the \$200 item admitted in the pleadings to have been borrowed, but alleged therein to have been repaid. The testimony shows that this \$200 was not the \$150 and the \$175 spoken of by the defendant, but was the \$200 for which the defendant gave his check, which check was endorsed by the plaintiff and George Meyers, and afterwards repaid in full.

6. Errors of law.

Under this heading are mentioned a large number of rulings on questions. I have examined them all, and I fail to find any error which is substantial or which was not cured.

The motion for a new trial is denied.

Filed in the District Court, District of Alaska, First Division. Jan. 3, 1916. J. W. Bell, Clerk. By John T. Reed, Deputy. [11]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEO. MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Judgment.

This cause came regularly on for trial on the 7 day of December, 1915, before the Court and a jury of 12 citizens, duly empaneled and sworn to try the cause; the plaintiff appeared in person and by her attorneys, Messrs. Cheney & Ziegler; defendant also appeared in person and by his attorneys, Messrs. Gunnison & Robertson; all parties announcing their readiness for trial, the plaintiff introduced evidence on her behalf; defendant then introduced his evidence, both as to the defense and as to the counterclaim and the plaintiff evidence in rebuttal; whereupon each side having rested, after arguments of counsel the Court instructed the jury, and the jury retired to deliberate upon their verdict; thereafter the jury returned into court with the following verdict:

*“In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEO. MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Verdict.

We, the jury in the above-entitled cause find for the plaintiff, and assess the amount of her recovery at \$418.35.

FRANKLIN W. BUTTERS,
Foreman.”

—which said verdict was received and filed in open court; thereafter defendant filed a motion for a new trial, which said motion, after argument, was denied; [12]

Now, therefore, the Court being fully advised in the premises,

It is ordered, adjudged and decreed that Mrs. Geo. Meyers, the plaintiff in this cause, do have and recover of Michael George, the defendant herein, the sum of \$418.35, with interest thereon at the rate of 8% per annum from December 9, 1915;

It is further ordered that plaintiff recover of and from the defendant her costs and disbursements herein expended, to be hereinafter taxed by the clerk of this court.

Execution stayed for 60 days from this date on the furnishing of bond in double the amount of judgment.

Done in open court this 4th day of January, 1916.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal No. L, page 278.

Filed in the District Court, District of Alaska, First Division. Jan. 4, 1916. J. W. Bell, Clerk.
By —————, Deputy. [13]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Bond for Stay of Execution.

WHEREAS, the defendant in the above-entitled action is about to sue out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment made and entered against him in said action in the above-entitled court, in favor of plaintiff herein, which said judgment was made and entered on the 4th day of January, 1916, for FOUR HUNDRED EIGHTEEN 35/100 (\$418.35) DOLLARS, and the whole thereof, as well as the proceedings upon which the same is

based and the refusal to grant the motion for a new trial; and

WHEREAS, the above-entitled court has by an order made and entered the 4th day of January, 1916, stayed the execution in said above-entitled cause, for a period of sixty days conditioned upon the defendant's giving a good and sufficient bond in double the amount of said judgment, providing that said defendant shall with due diligence sue out a writ of error, and answer all costs and damages which may be awarded against said defendant, Michael George, if he fail to make good his plea, [14] or if the judgment of this Court is affirmed, on any judgment of this court, or said Appellate Court, or any court to which it may be appealed or removed by writ of error;

NOW, THEREFORE, in consideration of the foregoing and of the premises and of said stay of execution, we, the undersigned, do, jointly and severally, undertake and promise and do acknowledge ourselves jointly and severally bound unto said plaintiff, Mrs. George Meyers, in the sum of One Thousand (\$1,000.00) Dollars, being double the amount of said judgment, that the said defendant shall with due diligence sue out his writ of error, and will pay all damages and costs which may be awarded against said defendant, Michael George, if he fail to make good his plea or if the judgment of this court is affirmed, on any judgment of this court, or said Appellate Court, or any court to which it may be appealed or removed by writ of error; otherwise, this bond to be null and void and of no effect.

Sealed with our seals and dated this 4th day of January, 1916.

GUY McNAUGHTON.

E. J. McKANNA. [15]

United States of America,
Territory of Alaska,
Division Number One,—ss.

Guy McNaughton and E. J. McKanna each being first duly sworn on oath, each for himself and not one for the other, deposes and says: that I am the surety on the foregoing bond; am a resident of the District of Alaska, but not an attorney at law, marshal, clerk of any court, or other officer of any court, and am qualified to be bail, and am worth the sum of ONE THOUSAND (\$1,000.00) DOLLARS, exclusive of property exempt from execution and over and above all just debts and liabilities.

GUY McNAUGHTON.

E. J. McKANNA.

Subscribed and sworn to before me this 4th day of January, A. D. 1916.

[Notarial Seal]

R. E. ROBERTSON,

Notary Public in and for the Territory of Alaska.

My commission expires June 19, 1917.

The foregoing bond and sureties thereon examined and approved.

Done in open court this 4th day of January, 1916.

ROBERT W. JENNINGS,

Judge of the District Court.

Copy of within bond received January 4, 1916.

A. H. ZIEGLER,

Of Counsel for Plff.

Filed in the District Court, District of Alaska, First Division. Jan. 4, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: In the District Court for the Territory of Alaska, Division No. 1. Mrs. George Meyers, Plaintiff, vs. Michael George, Defendant. Bond for Stay of Execution. Gunnison & Robertson, Attorneys for Defendant, 101-105 Decker Building, Juneau, Alaska. [16]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Order Extending Time 30 Days from March 4, 1916,
to Prepare Bill of Exceptions, etc.**

Now, on this day this matter coming on for hearing upon the oral motion of defendant, by his attorneys, Gunnison & Robertson, for further time in which to prepare, settle, allow and file his bill of exceptions herein; and the plaintiff, by her attorneys, Cheney & Ziegler, consenting thereto; and the Court being fully advised in the premises,

IT IS ORDERED that defendant be, and he hereby is, given thirty days from the date hereof in which to prepare, settle, allow and file his bill of ex-

ceptions herein, and it is further ordered that execution be stayed thirty days from the date hereof.

Done in open court at Juneau, March 4, 1916.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal No. L, page 359.

O. K.—CHENEY and ZEIGLER,

By A. H. ZEIGLER,

Filed in the District Court, District of Alaska,
First Division. Mar. 4, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [17]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

vs.

MICHAEL GEORGE,

**Order Extending Time to April 10, 1916, to File
Bill of Exceptions, etc.**

On request of R. A. Gunnison, Esquire, of counsel for defendant, and plaintiff's counsel consenting thereto, the defendant is given until the 10th day of April, 1916, in which to file and present for settlement a bill of exceptions herein.

Dated March 28, 1916.

ROBERT W. JENNINGS,

District Judge. [18]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Order Extending Time to April 17, 1916, to File Bill
of Exceptions, etc.**

Now, on this day this matter coming on for hearing on the motion of the defendant by his attorneys for further time in which to have allowed and settled the bill of exceptions, and to file the same; and the plaintiff being present in court by her attorneys and consenting thereto,

IT IS ORDERED, that defendant be and he hereby is allowed seven days from the date hereof in which to present his bill of exceptions, and in which to have the same allowed, settled and filed.

It is further ordered that execution be stayed for a further period of seven days from the date hereof.

Done in open court this 10th day of April, 1916.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal No. M, page 11.

Filed in the District Court, District of Alaska,
First Division. Apr. 10, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [19]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Order Extending Time to April 27, 1916, to Prepare
Bill of Exceptions, etc.**

Now, on this day this matter coming on regularly for hearing on the motion of the defendant, by his attorneys, Messrs. Gunnison & Robertson, for further time in which to prepare, present, and have allowed and filed, the bill of exceptions herein; and the plaintiff, by her attorneys, Messrs. Cheney & Ziegler, consenting in open court thereto; and the Court being fully advised in the premises;

IT IS ORDERED, that the defendant be, and he hereby is, allowed further extension of time of ten days from the date hereof in which to prepare and present and to have allowed and to file his Bill of Exceptions herein.

It is further ordered that execution be stayed for a further period of ten days from the date hereof.

Done in open court this 17th day of April, 1916.

ROBERT W. JENNINGS,

Judge of the District Court.

Entered Court Journal No. M, page 21-22.

Filed in the District Court, District of Alaska,
First Division. Apr. 17, 1916. J. W. Bell. Clerk.
By C. Z. Denny, Deputy. [20]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that heretofore and on
the 15th day of June, 1915, the defendant herein,
duly and regularly filed with the clerk of the above-
entitled court, the following motion:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Motion to Require Plaintiff to Make Complaint
More Definite, etc.**

Comes now the above-named defendant and moves this Honorable Court:

I. That plaintiff be required to make her complaint herein more definite and certain in this: that she be required to show in paragraph II of her first cause of action the place at which said services are alleged to have been performed for defendant.

II. That plaintiff be required to make her complaint herein more definite and certain in this: that she be required to show in paragraph I of her second cause of action (a) the place at which said store therein referred to was situated; (b) between what days and dates the term of 26 months therein referred to extended, and the days, months and years covered by said alleged term of 26 months; (c) in lines 16 and [21] 17 thereof, what rental is referred to and for what purpose; (d) to whom defendant promised and agreed to pay said amount therein referred to as his share of the rental of said store.

III. That paragraph II of plaintiff's second cause of action be stricken on the ground that it is a conclusion of law.

This motion is based on the records and files herein.

(Signed) GUNNISON & ROBERTSON,
Attorneys for Defendants.

BE IT FURTHER REMEMBERED that thereafter and on said 15th day of June, 1915, the said

defendant herein duly and regularly filed with the clerk of the above-entitled court the following demand:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Demand for Bill of Particulars.

To the Above-named Plaintiff, and to Z. R. Cheney, Esq., and A. H. Zeigler, Esq., Her Attorneys:

Comes now the above-named defendant and makes demand upon you that you furnish him within five days of the service of a copy of this demand upon you, with an itemized statement or bill of particulars, duly verified, of the account for services referred to in paragraph II set forth in the first cause of action of plaintiff's complaint. This demand is based upon the records and files herein and upon Section 906 of the Compiled Laws of Alaska.

(Signed) GUNNISON & ROBERTSON,
Attorneys for Defendant.

BE IT FURTHER REMEMBERED, that thereafter and after the due service of said demand on the plaintiff herein, and on the 21st day of June, 1915,

plaintiff filed with the clerk of the above-entitled court her bill of particulars, as follows: [22]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

CASE NUMBER 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Bill of Particulars Covering Items in First Cause of
Action.**

Michael George to Mrs. George Meyers, Dr.

To services rendered, consisting of cooking,
attending to bedroom, laundry work,
sewing and duties as a general house-
keeper, for Michael George, from Octo-
ber 18, 1909, to December 18, 1911, at
\$15.00 per month.....\$390.00

I, A. H. Zeigler, one of the attorneys for plaintiff
in the above-entitled action, do hereby certify that
the foregoing is a full, true and correct account, or
bill of particulars, upon which plaintiff's first cause
of action is based in this cause.

(Signed) A. H. ZEIGLER,
Attorney for Plaintiff.

BE IT FURTHER REMEMBERED that there-
after and on the 3d day of July, 1915, the defendant
herein duly and regularly filed with the clerk of the
above-entitled court the following motion:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Motion to Make Bill of Particulars More Certain
and Definite.**

Comes now the above-named defendant, and respectfully moves this Honorable Court that the plaintiff be required to make her bill of particulars more definite and certain, on the ground that the bill of particulars furnished is defective in that it does not in any way itemize the account which it alleged in the complaint. This motion is based on the records and files herein.

GUNNISON & ROBERTSON,
Attorneys for Defendant. [23]

BE IT FURTHER REMEMBERED that thereafter and on the 7th day of July, 1915, the said Court entered the following order:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Order Granting Motion to Strike Certain Portions
from Complaint, etc.**

This cause comes on regularly for hearing at this time upon the motion by defendant that the plaintiff be required to make her complaint more definite and certain in those respects particularly set forth in paragraph one and two of the motion, and to have paragraph two of her second cause of action stricken on the ground that it is a conclusion of law, R. E. Robertson, Esq., appears in support of the motion, and A. H. Zeigler, Esq., in opposition thereto; after hearing argument of respective counsel the motion to strike was granted and the other part of the motion is denied; and thereupon Mr. Robertson states that he has exceptions to the bill of particulars filed by plaintiff in response to defendant's request, on the ground that the same are not definite and certain and asks that he be allowed to state his exceptions at this time and argue the same, which request is allowed; and thereupon after hearing argument of Mr. Robertson, the exceptions are disallowed and defendant is given 7 days from this date in which to

plead to the complaint. (Entered in Court Journal K, page 472, on July 7, 1915.)

To which order denying defendant's motion and refusing to allow defendant's motion to make the bill of particulars more definite and certain, defendant excepts and exception is allowed. [24]

BE IT FURTHER REMEMBERED that thereafter and on the 7th day of December, 1915, this cause came on regularly for hearing before a jury of twelve men, duly empaneled, sworn and charged to hear and determine the same, the Honorable Robert W. Jennings, presiding, at the regular October, 1915, term of said court, and the parties being present in court, in person and by counsel, the following proceedings were had: [25]

**Testimony of Mrs. George Meyers, in Her Own
Behalf.**

Whereupon plaintiff, to prove the issues of her case, called the witness, Mrs. GEORGE MEYERS, the plaintiff, who being first duly sworn, testified as follows:

Direct Examination.

(Questions Propounded by Mr. CHENEY.)

My name is Mrs. George Meyers; I am the wife of George Meyers. I am the plaintiff in this suit against Mike George. Mike George, the defendant, lived in my house, which was upstairs, the store being downstairs. The house was in Douglas. Mike George and George Meyers were in partnership together in the store. Mike George came out in October, 1909, and he stayed at my house two years and

(Testimony of Mrs. George Meyers.)

two months. I cooked for Mike George; I attended his room, washed his clothes. I do the work in the house there, and Mike George come and eat with us. Mike George was not married at that time, and he did not have a wife or any family in Douglas. He come all alone in my house. He got children back east in Pawtucket. Mike George had a room of his own in my house at that time—I got two rooms upstairs; I sleep—my husband and myself, in one room, and he sleep in one room; the time the house burned upstairs we moved downstairs; he moved downstairs and he stayed next to the store in another room, and we all eat in my house; he ain't got no stove in his room, and cannot cook for himself, and he eats in my house; after the house burned upstairs, no more house upstairs. There was a fire upstairs and burned the upper part of the building, and my children were burned up; and my husband was down below in Seattle, and me and Mike was all. After the fire, I moved downstairs; this house belongs to us downstairs, and I go down; I got no money, and he got nothing; he was in partnership with my husband. He had a room downstairs. I do work for Mike George and furnish him meals until the time he finish partnership with my husband in December, 1911. He paid me something for the work I did—he paid me—sometimes I asked for money, and sometimes he paid me—three months, \$15.00 a month, and the [26] last month, I don't exactly remember, \$12.00 or \$7.00; I got it marked on the book; I bring the money all the time and told my husband to mark it

(Testimony of Mrs. George Meyers.)

in the book; I cannot write myself, and he can't, so he told my husband to put it down. When he paid me I had my husband put it down in the book in my language, Syriac. I don't remember how much each payment was; my husband has got it, I think, \$72.50 he paid me. I would know the book (counsel exhibits witness book), that is the book and he know it too; that is the book I had my husband put it down in when he paid. Because of the work, that is all, I charged him \$15.00; he say: "You do that work for me, and I pay you what it is worth," and I charged him \$15.00 a month, and he never paid me anything except what is in this book—about \$75.00—\$72.50 is in the book. I did his washing for him, I did the laundry, cleaning, sewing and everything, and cooked for him. He stayed there all the time while my husband was away; some time my husband was down below, and we eat altogether, me and him. This book is in Mr. Meyer's writing, because my husband do writing himself; I cannot write at all, and he cannot write, he cannot write his name. I saw Mr. Meyers write it in the book; I told him what to put down, at the time I got the money, he put it down, my husband and me; Mike was there too. I cannot tell the page, and I cannot read it. This is the book, and he knows it too; my husband, he told him to put it in. Mike cannot read, but George can read in his own language.

Whereupon, page 3 of the book was marked Plaintiff's Exhibit "A" for Identification.

Whereupon, said witness testified further as fol-

(Testimony of Mrs. George Meyers.)

lows: George Meyers and Mike George were in partnership in running this store there in 1909 to 1911, September, 1911; the building belonged to us, belonged to my husband; when Mike come from the east, he got nothing; he come and stayed in my house; that belonged to us. I know about the agreement Mike George and George Meyers had about the rent for the store building that George Meyers owned; my husband tell me; [27] both to pay \$30.00 a month; Mike George's half of that was half of \$30.00 a month. At the time he finished partnership with my husband he moved some goods, and he said: "I am going to pay rent and make a new store; I ain't got much money to pay now; after while I pay you." He talk like that to my husband three or four times; he come to my house, and he say: "Ain't got no money now; I am going to start and make a new store." I don't think he paid nothing for the rent of the store; he said he would pay after while: "I am going to start up my own store now; I am going to pay the rent after while, because I ain't got much money now." Mike George didn't have any store before that—before he quit the business with my husband he didn't run any store only with my husband; the first day he come in, he sleep in my house, and the next day he start partnership with my husband, and he stayed all the time until they finished the partnership in December, 1911. Mr. Meyers assigned over to me this account for rent in this case.

(Testimony of Mrs. George Meyers.)

Cross-examination.

(Questions Propounded by Mr. ROBERTSON.)

I don't know what relation Mike George and George Meyers are; they are not cousins. I have known Mike since October, 1909, since he come in partnership with my husband I know him. I don't know what date he come; I know just October, 1909, that is all I know. I didn't see Mike in Pawtucket before that; I don't know him; he come in and started partnership with my husband and I don't know him before that; I don't know if my husband know him before. I was living in my house in Douglas in the store, right above the store at the time Mike came to Douglas; the store downstairs, and two rooms upstairs, and I lived upstairs; he got one room, and me and my husband and my children sleep in one room. Mike stayed in my house altogether two years and two months. There were two rooms altogether upstairs, the kitchen and another room, and he slept in the kitchen, and I bought a bed; he slept in the kitchen until the house burned down, when he moved downstairs. I don't remember when the house burned. [28] I haven't marked it in a book; I don't know exactly what month. Mike George was sleeping in the kitchen at the time the house burned and me and my children were sleeping in the other room, and my husband was down below. I did not buy my groceries of Mike O'Connor but in my store, and I do the cooking and washing, and wash the sheets for his bed. I wash the sheets on Mike's bed and his underclothes every week. He sent his white

(Testimony of Mrs. George Meyers.)

shirt to the laundry; I didn't wash it. Mike had 2 sheets, 1 blanket and 1 quilt on his bed; I never wash the blanket. I always do all the washing myself, and sometimes I work in the store after that. I had three babies in 1909. Mike paid me some, about \$72.50, and I got it marked down in the book. My husband marked it in the book at the time I got the money, I told him to put it in the book. Since then I asked him three or four times, and he say, "I ain't got much money." After that I go down below, and after I go below my husband send for me for that case, and at that time I had trouble, and I ain't talked to him since, and I didn't say anything to Mike about this last spring on April 12th. I never speak to Mike, and I didn't borrow \$200.00 last spring from Mike. I don't know who did borrow the \$200.00. I didn't swear in my reply that I borrowed \$200.00. I never asked Mike for the money at all after I come back, but think my husband asked him, and I never asked Mike for money on April 12, 1915.

Whereupon, court adjourned until 1:30 P. M., at which time said witness testified further as follows:

I saw Mike George back East in Pawtucket when I passed through there. I don't know what he was doing there; I didn't see no business or store that he had. He was living in a house, and I didn't stay at his house at all. I did Mike's washing and everybody's every Saturday for 26 [29] months, and he slept in the kitchen all the time until the house burned. At the time it burned he sleep downstairs in a room and I and my husband and he eat alto-

(Testimony of Mrs. George Meyers.)

gether. I don't know what time we bought a cabin from Mike O'Connor; we bought the store, myself and my husband, before Mike come, from an old Indian woman. My husband bought a cabin from Mike O'Connor and Mike George didn't have anything to do with the buying of it. When the house burned we moved across the road. The store belonged to me and the upstairs burned and left the downstairs and Mike slept in a room next to the store, and we moved across the street. I used to go across to the house every day and clean up his room, about 6 o'clock when he got up. Mike didn't have any furniture and so I bought the bed myself for him and I put the carpet down; there is a second-hand stove down below, and I bought it myself, and Mike used to go across the street to eat. In September, 1911, they finished and Mike didn't have no more eats in my house. In October, 1909, that time he started partnership with my husband, he told me, "You do that work, and I pay you what it is worth, cooking, do my laundry, fix my room, and I pay you what it is worth." I tell him, "I charge you for my work, that is all, \$15.00." Me and my husband and Mike were present at that time and the conversation took place in the store or in my room, and my husband write it all down. I don't know the time he give me the money, three months \$15.00, last month, I think, \$12.00, the other is marked in the book. And my husband wrote it down in the book with the same pencil.

Whereupon the following proceedings took place:

(Testimony of Mrs. George Meyers.)

“Q. How much did you pay your husband, Mrs. Meyers, for this account that he has got against Mike George?”

“Mr. CHENEY.—I object to that, if the Court please, because they have raised no question about its being an assignment; it [30] isn’t necessary under the law that she pay him anything—it is assigned for the purpose of collection in this suit.”

“The COURT.—Objection sustained.”

To which defendant excepts, and an exception was allowed.

“Q. Was the assignment in writing, Mrs. Meyers?”

“The COURT.—She doesn’t know what assignment means.”

Whereupon, said witness testified further as follows:

My husband wrote in the book about the rent, the time he give me that money he write that is all, and he paid me three, that four months, and he put it in the book; the rest I asked him, “Do you want to pay me?” He said, “You wait a short time; I ain’t got enough money to pay the rest,” that is the working I am talking about. He didn’t pay nothing about the rent and my husband asked him twice, and he sent him a notice from Mr. Cobb, and he didn’t answer it at all; I don’t know anything about the rent—and he didn’t pay him anything at all for the rent of the store—I know he didn’t pay him; I hear my husband tell it. I saw my husband write it in the book, but I don’t know what book or where he got it

(Testimony of Mrs. George Meyers.)

from, and I don't know the kind of pencil, what color it was. I don't know how long my husband stayed down below, and he didn't come back on the same boat he went down on.

Whereupon the following proceedings took place:

“Q. About the rent in there, did your husband write down in this book about the rent too?”

“Mr. CHENEY.—This witness hasn't testified to this book regarding the rent that was due to George Meyers; she has confined her testimony to this account which she says her husband wrote down for Mike George and her for this work which she did—this is not cross-examination.”

“The COURT.—Objection sustained.”

To which defendant excepts, and an exception was allowed. [31]

Testimony of George Meyers, for Plaintiff.

Whereupon plaintiff, in further proof of her case, called the witness, GEORGE MEYERS, who, first being duly sworn, testified as follows:

On Direct Examination.

(Questions Propounded by Mr. CHENEY.)

My name is George Meyers. I have lived in Douglas for 20 years, with the exception of 4 years when I went to the old country. I run a store in Douglas. That is my book (referring to Plaintiff's Exhibit “A”) which I have had in the store for seven or eight years.

And thereupon the following proceedings took place:

(Testimony of George Meyers.)

“Q. Now, Mr. Meyers, Mrs. Meyers has been testifying about an account that she has against Mike George for washing and cooking and taking care of his room and things of that kind, and she has testified about a certain amount of money she claims was paid by Mike George to her, and she says it was written in the book—now, can you identify page 3 of this book—what is this on page 3, Mr. Meyers?”

“A. Well, this time George he come in from the East here, the first year I seen him down at Pawtucket.”

“Q. And Mike came out to Alaska and went into business with you, is that right?” “A. Yes.”

“Q. When was that?”

“A. 1909; the 18th of October, the time when he came here.”

“Q. That is the time you started in business together?” “A. Yes.”

“Q. Now, let us confine this testimony to the entries in that book—is that in your handwriting?”

“A. Yes, my handwriting.”

“Q. Who asked you to make those entries in there [32] —that is, who asked you to write in there in that book?” “A. My wife.”

“Q. And what is shown there by those payments?”

“A. What does it say?”

“Q. Yes, just explain it to the jury—what does that say?”

“A. Why, it says, ‘Mr. George to give my wife \$15.00 a month for washing and cooking and fixing

(Testimony of George Meyers.)

his clothes and bed, and working in the house for him.' ”

“Q. That is what it says in there?” “A. Yes.”

“Q. What are those entries where the figures are?”

“A. He paid first \$15.00, another time \$15.00, for three or four months; we got here \$72.50 from here to here (indicating), \$72.50.”

“Q. What is this here that looks like a ten?”

“A. That, in the old country where I come from, means \$15.00, because it is a different figure.”

“Q. Hold the book up in front of the jury and explain what the figures mean—what is that that looks like a ten?”

“A. This is 15, this is 10 and this is 5 (indicating).”

“Q. Now, I call your attention to this page here, and the first month, and the first line shown, there is a payment endorsed here?”

“A. Fifteen dollars.”

“Q. What is that first payment?”

“A. Fifteen dollars.”

“Q. What is the second one?”

“A. Fifteen dollars, October, just the same.”

“Q. What is that figure (indicating)?”

“A. Fifteen.”

“Q. What is the third one?” [33]

“A. Fifteen.”

“Q. What is that one (indicating)?”

“A. Fifteen.”

“Q. What is this last one?”

(Testimony of George Meyers.)

"A. Twelve dollars and a half."

"Q. That is \$72.50 (indicating)."

"A. Seventy-two and a half, that is what we got from him."

"Q. Was Mike there in the store at the time you put these figures in the book—was Mike in the store?" "A. Yes."

"Q. You were in business together?"

"A. In business together."

"Q. Lived in the same house?"

"A. Lived in the same house."

"Q. And always friends, were you?"

"A. Yes, pretty good friends."

"Q. What is the date of the \$12.50—what is that, George?" "A. It is in March."

"Q. March, what year, do you know?"

"A. I don't know the year, just March, from one month to another, because it runs from one month to another."

"Q. Now, what years are these first entries?"

"A. This one, \$15.00, starting from September."

"Q. I mean what year—what year?"

"A. The summer, 1909."

"Q. What is the last one—what year is the last one?" "A. That is March."

"Q. March isn't a year—what year—was it the same year or the next year, 1910?" "A. 1910."

[34]

"Q. This is 1910 (indicating)."

"A. This is 1910."

(Testimony of George Meyers.)

“Q. From this mark here, this parallel mark here?”

“A. Yes, \$15.00 starting September, \$12.50, in 1910.”

“Q. The rest of it was in 1909?”

“A. The rest of it was in 1909.”

“Q. I understand, then, George, that the last two entries that you have here are 1910?”

“A. Yes, 1910.”

“Q. The first, you say—does it say you entered into business in 1909?”

“A. Yes.”

“Q. In what month?”

“A. October.”

“Q. Then, what is the first entry down here—did you say that was September or October; you say up here it says something about Mike’s account with Mrs. Meyers, and you say this is 1909 (indicating). Now, in October you say you went into business.”

“A. Well, I marked here in the book.”

“Q. What is the entry—what is it, October or November?”

“Mr. ROBERTSON.—We object to that as leading, let him state.”

“The COURT.—Yes, don’t lead him.”

“A. This is the last month.”

“Q. The last month in the year, is it December?”

“A. In December.”

“Q. December, what year?”

“A. 1909.”

“Q. Now, you say this is in 1909, this entry here (indicating), \$15.00?”

[35] “A. Yes.”

“Q. You say that this first entry is in 1909?”

“A. Yes.”

(Testimony of George Meyers.)

“Q. Now, you say that the last two are in 1910?”

“A. Yes.”

“Q. I am not asking you about this, I am asking you about this (indicating); what month of the year of 1910 is that—did you say that was the last month in the year?”

“Mr. ROBERTSON.—I object to that as leading and suggestive.”

“The COURT.—Now, Mr. Cheney, take that book and have him read in English what you have got there about the entries.”

“The WITNESS.—\$15.00—I didn’t put his name, I have \$15.00.”

“The COURT.—What date is that—what date does that show?”

“A. I cannot make that month out, the last month.”

“The COURT.—Does it give the date there? Does it say what date it is, the first \$15.00?”

“A. I cannot make it out myself.”

“Q. Do you know of your own knowledge without looking at this, do you know what date it was?”

“A. The last month, what is the name of that month, you say?”

“Q. Do you mean the last month in the year?”

“A. We got \$15.00 in December from him.”

“Q. Now, the next one?”

“A. This month, November, \$15.00.”

“Q. Let me ask you a question—what kind of a calendar do you have, Assyrian; you have the old kind of calendar or do you have the kind we have?”

(Testimony of George Meyers.)

“A. Yes, the same; we call them years just the same.” [36]

“Q. What do you call December—do you call that the last month?”

“A. No, don’t call it the last month.”

“Q. What do you call it?”

“A. I call it this month, I say last month.”

“The COURT.—November, last month?”

“A. December.”

“Q. What is the second line you have got there—what month is that and what year is that?”

“A. This is 1909, just the same, January this month.”

“Q. What month is that?”

“The COURT.—I think that you should have an interpreter for this man for the reading of those entries.”

“Mr. CHENEY.—We will call Louis Saloum.”

“Mr. ROBERTSON.—We object to Louis Saloum interpreting.”

“The COURT.—Wait until he comes in here and then interrogate him.”

To which defendant excepts and an exception allowed.

“Judge GUNNISON.—I submit, your Honor, that if that exhibit were handed to someone who could make a translation of it we could save a lot of time.”

(Whereupon LOUIS SALOUM was called and interrogated as follows:)

(Questions by the COURT.)

“Q. Are you a countryman of this man?”

(Testimony of George Meyers.)

"A. Yes, sir."

"Q. How long have you been in Alaska?"

"A. About 5 years."

"Q. What business are you in?"

"A. I have a store."

"Q. Whereabouts?" "A. Douglas."

"Q. Are you related to these people in any way?"

"A. Yes, they are related to me." [37]

"Q. Are you interested in this case, financially or in any way—if Mrs. Meyers gets a judgment against this man does any part of that money go to you?"

"A. No."

"Q. Are you interested in any way whatever?"

"A. No, I have nothing to do with it, nothing goes to me."

"The COURT.—Very well."

"Mr. ROBERTSON.—Now, if the Court please, this man, Louis Saloum, is one of the main witnesses of this man George Meyers, and we have got to ask if Louis Saloum is going to interpret that we be permitted to call one of our witnesses in here to see that this man testifies to the truth."

"Mr. CHENEY.—I think Mr. Meyers has explained as fully as I want him to explain it; he explained it, and I am not going to waste any more time on it unless you insist on it; he has explained it."

"The COURT.—If the jury and the Court cannot understand the rest of the testimony any more than they understand that, we will have to have an interpreter."

(Testimony of George Meyers.)

“Mr. ROBERTSON.—I would like to call someone to interpret with him as we may desire to show that this man Saloum prepared the book.”

“Mr. CHENEY.—We are not asking for an interpreter.”

“The COURT.—Very well, Mr. Robertson, call your interpreter.”

(Whereupon Jake Saloum was called to interpret for the defendant. And Louis Saloum was sworn as interpreter.)

To which defendant excepts and exception allowed.

“Mr. ROBERTSON.—Will your Honor swear this man also?”

“The COURT.—No.”

“Mr. ROBERTSON.—We would like to be in a position to contradict this man Louis Saloum later on.”

To which defendant excepts and exception allowed.

“The COURT.—You can put him on the witness-stand any [38] time you want to, and if it become necessary to take his testimony you can have him sworn.”

(Questions by Mr. CHENEY.)

“Mr. Saloum, if you can read this writing here in Assyrian language to the jury, do it—read it in English.”

“Mr. ROBERTSON.—Do I understand that he is going to read the entries in the book, or acting as in-

(Testimony of George Meyers.)

terpreter for George Meyers?"

"The COURT.—I understood you to say you were through on that question with Mr. Meyers."

"Mr. CHENEY.—Yes."

"The COURT.—Ask him some other question, then, and this man will interpret it and put the answer to the jury."

"Mr. CHENEY.—Does the Court suggest that we have to use an interpreter for all of his testimony?"

"The COURT.—Yes, proceed."

"Mr. CHENEY.—I will ask him to read this, then, as long as he is here."

"Mr. ROBERTSON.—If the Court please, we object to Louis Saloum acting as a witness; he is now acting as interpreter, and he cannot act as translator."

"Mr. CHENEY.—If he can read those entries, I don't see why he has to be sworn."

"The COURT.—Swear him to read that correctly."

(Whereupon said Louis Saloum was duly sworn to read correctly the entries appearing upon Plaintiff's Exhibit "A.")

To which defendant excepts and exception allowed.

"Mr. ROBERTSON.—If the Court please, may we have this man follow the reading of the book."

"The COURT.—Certainly, he can follow it."

"Mr. CHENEY.—If the Court please, I object to that, we have our own witnesses, and they are going

(Testimony of George Meyers.)

on to deny all of this afterwards.” [39]

“The COURT.—Proceed.”

“The WITNESS SALOUM.—“I received from Mike George rent for board and eating and board and washing clothes on every month, \$15.00; on November 18th, received \$15.00; on December 18th, \$15.00; on January 18th, \$15.00; on February 18th, 1910, \$15.00; on March 18th, \$12.50; \$72.50.”

“Q. The last one in March and the other one before that is February?”

“A. Yes, because from one month after another.”

“Q. Is that right?”

“A. I guess it is right; that is what they said here.”

“The COURT.—Are you going to have any more figures?”

“Mr. CHENEY.—No.”

“The COURT.—Then, you can leave the room both of you.”

(Whereupon said Louis Saloum and Jake Saloum left the courtroom.)

And thereupon said witness testified further as follows:

The first day Mike George came here from the East I met him at the boat and he stayed at my house. We had two big rooms upstairs, we lived in one and Mike lived in the other for two years and two months. Mike ate with us and my wife did his washing and took care of his room.

And thereupon the following proceedings took place:

(Testimony of George Meyers.)

“Q. He did eat with you?”

“Mr. ROBERTSON.—Now, may it please the Court, I realize that when we are dealing with foreigners it is difficult to ask questions, but, of course, this man is a ready and willing witness, and to propound questions to him that are so leading and suggestive, it seems to me to be improper; I object to that question and I object to any further examination of that character.” [40]

“The COURT.—Don’t lead the witness any more than is absolutely necessary—don’t lead him at all.”

And thereupon said witness testified further as follows:

Mike didn’t pay me any money—every time he paid the money to Mrs. Meyers, and she would tell me and I marked it down each time. My wife received the money that is marked down in the book. The next year after Mike and I started in business, I went to Seattle to buy goods, that was in 1910. I left Mike and my wife and I told him, “She is here, and she attends to the work”; I left Douglas Island on the boat but before I reached Seattle I received a telegram that my house was burned and my children, and I came back on the same boat. After I came back from Seattle and the house was burned, we moved across the street in a two-room house. We used one room to sleep in and one to cook and eat in, and Mike had a little room next to the store. Mike had a small heating stove in his room. My wife and I were always good friends with Mike. I owned the building myself—I did not sell half to Mike—and

(Testimony of George Meyers.)

charged Mike \$15.00 a month for his share. I had an agreement with Mike about paying his share. When we started in to figure how much stock I had down there he said, "I don't want to stay for nothing, George"; he said, "I don't want to stay for nothing, I put something in"; I told him all right, \$15.00 a month; if you think that is too much I will charge you less. He said, "That is all right; we go on \$15.00." I received the rent for two or three months from him but after that the store did not pay very well, and he had to send some money to his children so he took \$100.00, and I took \$100.00 which I used for board and to buy meat and stuff for the house. I bought the meat myself uptown at the butcher-shop for the house. Mike agreed to pay \$15.00 a month rent for his share of the store building. Mike paid me \$45.00 for [41] rent and after that I had to wait as there was no money left. I entered that in the book at the time he paid me. I write it in the book. He sent four or five hundred dollars to his four children in Pawtucket. His wife was dead at that time. I marked on the second page of the book when Mike paid me the \$45.00 for rent. I have had this book seven or eight years.

(Whereupon page 2 was marked Plaintiff's Exhibit "B" for identification.)

And thereupon said witness testified further as follows:

The three entries on page 2 are \$15.00 each. Mike George had never paid me only \$45.00 for rent. He quit my store in December, 1911. He moved to another house, I let have him one month more until

(Testimony of George Meyers.)

he find another house, so he moved to another house and fixed it up and moved. He still owes me the balance for rent.

On Cross-examination.

(Questions Propounded by Mr. ROBERTSON.)

Mike George and I are cousins. At this time he owes me \$345.00 for rent, and owes \$317.50 to my wife. He owes me for twenty-six months at \$15.00 per month and we figured this up before he left the store. He paid me \$45.00, and paid my wife \$72.50. I asked him lots of times about this money he owed me, but we were friendly and I said, "I will get Mr. Henson down here," and he took the stock out of my store, and I take some down here; we take some out of the business, and we figure up 26 months he stayed at the time he left my store. I figured this up myself, this was before I went to talk with Mr. Cheney and Mr. Zeigler and Mr. Cobb. That was the first time I went to see Mr. Cobb. I told Mike if he didn't pay it I would have to see an attorney. This happened last spring. Since December 23, 1909. [[42] I have paid Mike \$242.50 on a judgment. I also paid back \$200.00 which I borrowed from him last winter. I told him lots of times about the money he owed me but he didn't settle it. Mike had \$242.50 after we dissolved partnership, on December 21, 1911, with board and house rent besides; we have Louis Saloum here and he fixed the books between me and Mike, and Mike he got the book in the house, and I didn't say anything about rent, or anything about work in the house; at that time it

(Testimony of George Meyers.)

was settled between the business. We thought after while he would get fixed in his store. While my wife had gone down to Seattle, Mike asked me for the \$242.50 and he attached my store for that amount. I don't remember of telling any one that Mike owed me \$345.00. I had to pay the \$242.50 because he closed my store up. We dissolved partnership on December 21, 1911, and at that time Mike owed me \$345.00. Mike said he had to move, and Louis Saloum was fixing the books, and he was looking at the time, and fixing the stove. On December 21, 1911, all bills and accounts and all differences were settled between Mike and myself, and were all paid, but the money was not settled. I have money still coming to me for rent, board and work; he had \$242.50 coming to him for this business.

(Whereupon Defendant's Exhibit No. 1 was marked for identification.)

Whereupon the following question was propounded:

"Q. Now, Mr. Meyers, I want you to think closely, because I am not trying to take advantage of you, but I want you to tell if these were not all paid up, why was it that on December 22, 1912, you signed this before Newark L. Burton, a Notary Public, this paper, wherein you state, 'That on or about the 21st day of December, 1911, the partnership which had theretofore existed between the plaintiff and defendant and which said partnership was designated and [43] known under the firm name and style of George Meyers & Company was by said plaintiff and

(Testimony of George Meyers.)

defendant herein mutually dissolved and at the time of such dissolution, all the bills, accounts, choses in action, and any and all differences between defendant and plaintiff were taken into consideration and fully settled'—why did you sign such a paper if they were not fully settled?"

And thereupon the witness testified as follows: I signed this paper but it don't say anything about the rent or board or housework. The cabin that I had my store in at Douglas, I bought from an Indian woman. First I bought the house, there was only one board all around, and only one window, and just a small door. I bought the house for \$265.00. I wrote to Mike to come to Alaska and go in partnership with me in the store.

And thereupon the following proceedings took place:

"Q. (By Mr. ROBERTSON.) At the time he went into partnership with you, George, he had advanced quite a bit of money on goods back in the east?

"A. We both had some; I had some and he had some.

"Q. Then it isn't true that Mike didn't have any money when he went into partnership with you is it?

"A. He had \$417.00.

"Q. \$417.00?

"Mr. CHENEY.—That, it seems to me, is all immaterial in this case.

"The COURT.—It is not cross-examination—objection sustained.

(Testimony of George Meyers.)

To which defendant excepts and exception allowed.

And thereupon said witness testified further as follows: I made the book up when Mike first came in my store. That is my writing in the book (referring to Plaintiff's Exhibits "A" and "B.")

And thereupon the following proceedings took place:

"Q. (By Mr. ROBERTSON.) Just read what that writing says (referring to Plaintiff's Exhibit "B").

"A. I cannot. [44]

"Q. Do the best you can, George.

"A. Read it in English?

"Q. Yes, I cannot understand Assyrian.

"A. We agree—

"Mr. CHENEY.—I object to that for the reason that when I was trying to get him to read it the Court said he would [44½] have to have an interpreter."

"Mr. ROBERTSON.—He never read that page."

"The COURT.—The whole thing is incompetent, irrelevant and immaterial at this time, because all that he has done is simply that this man has identified that page; he simply says that is his writing."

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

I marked those items when Mike first came in 1909, but not all at one time. I marked each month

(Testimony of George Meyers.)

as it was due, whenever my wife call me and say that he gave me \$15.00 and I marked it down. Louis Saloum was not present at that time, as he was in Seattle. He never worked for me, but worked for Mike. When I bought the house from the Indian woman there were no rooms upstairs at all, but I had it fixed up into rooms and it cost me \$300.00. There were two rooms up stairs. The kitchen is a great big room and Mike slept there until the house burned, which was in March, 1910. I made two trips down to Seattle, one before the fire and I received a telegram the house had burned so I came back on the same boat, then after that I made another trip down. After the house burned my wife and I moved across the street in the house which we bought from Mike O'Connor. Mike slept in the room off the store until we dissolved partnership. I didn't fix up the upstairs of the store again.

And thereupon the following proceedings took place:

"Q. When did you buy the cabin from Mike O'Connor, you and Mike George, when did you buy the cabin from Mike O'Connor?" [45]

"Mr. CHENEY.—I object to any testimony in regard to this cabin that was bought from Mike O'Connor, because we are suing for one-half the rental value of that store, which he says was \$30.00 a month, and Mike was to pay \$15.00 a month, because George Meyers owned the store; the witness has testified that all he is charging for is the store, and any testimony in regard to the cabin is imma-

(Testimony of George Meyers.)

terial on that score, and it cannot be material on Mrs. Meyers having done his washing or things of that kind; it don't make any difference if he slept in the addition or where he lived—if she did the work, she is entitled to the money."

"The COURT.—He isn't suing for a reasonable value of the store, he is suing for an agreed sum, which was to be \$30.00 a month, and his share of it was to be \$15.00. Objection sustained."

To which defendant excepts, and an exception was allowed.

. And thereupon said witness testified further as follows:

Since December 21, 1911, I have paid Mike George \$242.50, also \$200.00 which I borrowed from him.

On Redirect Examination.

(Questions Propounded by Mr. CHENEY.)

About a year after the dissolution Mike George sued me for \$242.50 and I paid it, as I did not want my store closed up by the attachment. This \$200.00 was a different amount. At the time I got the \$200.00 from him I told him about the rent; "That is all right," he said. My wife was sick and wanted to go below, but I told her she could not go, because we were short of money, and she said, "I will have to borrow a little money, because I am short of money myself." Mike was friendly with us, and sometimes ate with us, and so I borrowed [46] the \$200.00 from him. I am not charging Mike for where he stayed, but for half of the rent of the store

(Testimony of George Meyers.)

where the goods were and where we made the money. It was a large building I bought from the Indian woman, a story and a half house.

And thereupon the following proceedings took place in said testimony:

“Q. Now, when you went up there to Henson at Douglas and settled about the property, was there any papers made out?”

“A. Yes, sir, we had a paper.”

“Mr. ROBERTSON.—I object to that as not proper redirect examination.”

“The COURT.—Objection is overruled.”

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

This is the paper Mr. Henson drew up for Mike and I at the time we dissolved partnership, at the time Louis Saloum fixed the book. There were two rooms upstairs and Mike slept up there until the fire. After the fire Mike slept downstairs. [47]

Testimony of Louis Saloum, for Plaintiff.

Whereupon plaintiff, in further proof of her case, called the witness, Louis Saloum, who, first being duly sworn, testified as follows:

On Direct Examination.

(Questions Propounded by Mr. CHENEY.)

My name is Louis Saloum. I have lived in Douglas about five years. I came up here in May, 1910. Mike George and George Meyers were in partnership when I came up here.

(Testimony of Louis Saloum.)

And thereupon the following proceedings took place:

“Q. There has been something said here in regard to the store that George had there that he and Mike were doing business in—I will just ask you to state the approximate size of that building to the jury, if you know.”

“Mr. ROBERTSON.—If the Court please, we think that is immaterial.”

“The COURT.—It may be preliminary; I don’t see the materiality of it now, but it cannot hurt you one way or the other—objection overruled.”

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

It was a good-sized building, about half the size of the courtroom. They had a large stock of goods in there. Mike was staying there with George at that time and he stayed there until the time they dissolved partnership. I remember the settlement they had in the store in December, 1911,—I was present—that was the time they dissolved partnership.

And thereupon the following proceedings took place:

“Q. Now, state to the jury, what, if anything, was said between the parties, between George and Mike, at that time regarding the account of rent.” [48]

“A. Rent of what?”

“Q. For the store—that is, Mike’s part of the

(Testimony of Louis Saloum.)

rent for the store?"

"A. Well, you see when they settled the partnership they only settled the goods."

"Mr. ROBERTSON.—I object to that as not responsive—he is beginning to relate the circumstances."

"The COURT.—He hasn't gotten far enough to tell whether it is responsive or not—just tell what was said."

To which defendant excepts, and an exception was allowed.

"Q. What do you want me to say then?"

"The COURT.—Just state what was said there between Mike George and George Meyers."

"A. At the time they settled—of course, I started to tell you and you cut me off."

"Q. (By Mr. CHENEY.) All right, what did they do—what was it they said?"

"Mr. ROBERTSON.—We object to that, what they did in the way of a settlement—what they said, we have no objection to."

"The COURT.—What they did and what they said are both competent, if he knows."

To which defendant excepts, and an exception was allowed.

"A. They said some rent for Meyers and some work for Mrs. Meyers; they didn't settle everything there, they settled the goods and part of the property."

"Judge GUNNISON.—I object to that as not responsive and we move to strike it."

(Testimony of Louis Saloum.)

“The COURT.—What was said about the rent and the board, and who said it?”

To which defendant excepts, and an exception was allowed. [49]

“A. They said they settle that afterwards.”

“The COURT.—Who said that?”

“A. Both of them.”

And thereupon said witness testified further as follows:

When they had finished, there was due to Mike George \$242.50 for goods, and George had left to him \$15.00 a month rent, and work and board for Mrs. Meyers, \$15.00 a month. Mike and George talked this over and agreed to settle this afterwards, as they both expected to start a store and they didn't have much money. They agreed that Mike owed rent for two years and two months at \$15.00 a month, and that George owed Mike \$242.50.

And thereupon the following proceedings took place:

“Q. (By Mr. CHENEY.) The question I asked you now was, Louis, what they did in regard to the property.”

“Judge GUNNISON.—We object to what they did; what was said with reference to it, we have no objection to.”

“The COURT.—And what they did with reference to it is equally competent, if he knows.”

To which defendant excepts, and an exception was allowed.

(Testimony of Louis Saloum.)

And thereupon said witness testified further as follows:

I was a friend of both parties and we talked it over altogether, and I made the figures for them. They had a large amount of goods in the store, thirteen or fourteen hundred dollars worth and they had property outside and alongside the store building but not the store building. When they settled I figured everything for *the*; I figured that, and Mike and George agreed all about the goods and the part of the property that belonged to the store, alongside of the store; so it was agreed to that, and there was left \$242.50 to Mike; that has nothing to do with the property on the other side, never [50] mentioned that; they never said anything about that, they said to leave that until afterwards. They owned some property between them, that they bought in partnership, but they only settled about the store and goods. I was there all of the time until the whole transaction was finished, and Mr. George he moved two blocks up toward Treadwell, and Mike George moved his stock from the store to the beach and started a store of his own. They agreed to pay the rent Mike owed George.

On Cross-examination.

(Questions Propounded by Mr. ROBERTSON.)

My name is Louis Saloum. I married George Meyer's sister, and Mike George's mother is a sister to my grandmother. I have a lawsuit against Mike now pending, it hasn't been tried. I came to Douglas in May, 1910, and don't know what hap-

(Testimony of Louis Saloum.)

pened before that time. At the time they had the settlement Mike said he would pay \$15.00 a month rent, but I never heard anything about \$20.00 a month. I remember being a witness one time in the Commissioner's Court for Mike George. I do not remember saying at that time that Mike George had an agreement to pay George Meyers \$345.00, but nobody asked me about that. George Meyers didn't pay Mike George the \$242.50 until about a year after. I didn't say anything about the \$345.00 to anyone. At that time I testified that all that was owing between these parties was that George Meyers owed Mike George \$242.50. They had the settlement in December, 1911, and Mike said he would settle for the board afterwards. He said, "Because we have got the property between us," and Mr. George said to Meyers, "You owe me \$242.50," and he said, "Because I got no money to pay you and you got no money to pay me, we leave that matter go until afterwards." George said, "All right, we will fix it after"; they then went to Henson and made up an agreement and Mike bought the goods and Meyers bought the property. I don't remember ever hearing George Meyers say to Mike George, "Well, George, you have [51] done a lot of work on this store, and I am going to allow you \$250.00 for your services on the store."

And thereupon the following proceedings took place:

"Q. Well, Louis, if George Meyers said at that time he agreed to give Mike \$250.00 on account of

(Testimony of Louis Saloum.)

Mike's services for helping build up this store and make it into this large building you are talking about, if George Meyers said that, then you didn't hear all the conversation?"

"A. Yes, if George Meyers said that."

"Q. You didn't hear him say that?"

"A. No."

"Q. Then, if he did say it you didn't hear all the conversation?"

"A. I didn't hear him say that; I don't know whether he did say it or not."

"Q. Then, if he did say it you didn't hear all of the conversation?"

"A. I didn't hear him say it."

"Mr. CHENEY.—That is a matter of argument."

"The COURT.—Yes."

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

I was in Seattle at the time the store burned, and when I came to Douglas the Meyers' lived across the street in the O'Connor house in the house that George Meyers and Mike George bought from O'Connor.

Redirect Examination.

(Questions Propounded by Mr. CHENEY.)

Mike sued me for work I did for him. *In interpreted* for him and spent a great deal of time going over to court. [52] I was a witness in the case that Mr. Robertson questioned me about, and I an-

(Testimony of Louis Saloum.)

swered the questions Mike George's lawyer asked me in that case. He asked me in regard to the \$242.50, but said nothing about the \$345.00. Mike and George had been talking these matters over for about two weeks. George Meyers owned the building. They had decided on the \$15.00 a month rent before I came here, each to pay \$15.00 a month, and Mike said, "You have got no money, and I have got no money, and we will settle that afterwards."

Thereupon the following proceedings took place in said testimony:

"Q. Now, what I want to get at, what do you mean by the word settling—do you mean they pay afterwards; was there anything more said about them settling—

"Mr. ROBERTSON.—I object to his leading the witness."

"The COURT.—Objection overruled, answer the question."

To which defendant excepts, and an exception was allowed.

"Q. About the rent, I am speaking of."

"A. They said they would pay it afterwards—settle it afterwards—fix it afterwards."

"Q. You say they would pay it afterwards, is that what you mean?"

"A. That is what they mean; they would settle, fix it up afterwards."

And thereupon said witness testified further as follows:

(Testimony of Louis Saloum.)

Recross-examination.

(Questions Propounded by Mr. ROBERTSON.)

Meyers owned the store and so did not have to pay the \$15.00, but he wanted to get the \$15.00 from Mike

And thereupon the following proceedings took place: [53]

“Q. Louis, in that case you were talking about a moment ago in the Commissioner’s Court, wasn’t George Meyers asked whether or not Mike George owed him any money?”

“Mr. CHENEY.—I object to that asking what Meyers asked—that is not competent.”

“The COURT.—Objection sustained.”

To which defendant excepts, and an exception was allowed.

Whereupon plaintiff rested her case in chief. [54]

Defendant’s Case.

Testimony of Mike George, in His Own Behalf.

Whereupon defendant, in proof of his case, produced the witness, MIKE GEORGE, the defendant, who, first being duly sworn, testified as follows:

On Direct Examination.

(Questions propounded by Mr. ROBERTSON.)

My name is Michael George. I am a cousin to George Meyers. I have been living in Douglas over six years now and I have a store there. I have been engaged in the merchandise business since I have been here. I used to live in Pawtucket,

(Testimony of Mike George.)

Rhode Island, and George Meyers came over from the old country and told me he was my cousin. I used to run a store down there, and I loaned George Meyers \$500.00, and he stayed two or three months with me there, and eat and sleep there for nothing. He wanted me to go to Alaska, but I told him to go first and I said, "I come after you," and he came here with his wife and Mary Anderson and he only had \$500.00 which I loaned him. Every week he wrote for me to come, and so I came and went into business with Meyers. At that time they lived in the house they bought from the Indian woman, and I lived upstairs. It was a very small shack, the store downstairs and two rooms upstairs, and I slept in the kitchen until it got too cold then I moved into the room with the Meyers and we put up a partition between the beds. Meyers had three children, one about three or four months, one about four or five and one about three. I slept in the kitchen three nights and then slept in the Meyers' room about three months, and then moved down in the store and slept on a mattress, which I bought from an Indian woman, for about \$10.00. I put the mattress on the counter at night, and in the daytime I put it under the counter, and I put a sheet up to the window. [55] At the time I slept upstairs with the Meyers', I made a bed out of some boards and put the mattress on it, but I could not sleep there. I took care of this bed myself. Mrs. Meyers didn't take care of it, and I had no sheets, just a blanket and a quilt on top.

(Testimony of Mike George.)

Mrs. Meyers did my washing for three months but I was not satisfied with it as she got children, and altogether live in room, so I gave it to someone else after that time. After I moved down in the store, I did my own cooking and eat in the store—Mrs. Meyers didn't do any cooking for me after I moved downstairs. I slept on the counter for three or four months, and then Meyers and I bought the O'Connor cabin with partnership money. About 1910 we connected this cabin with the store and cut a door through and I slept in this room. I had a cooking stove, a bed and a few dishes, and I took care of the room myself. I usually did my own cooking but sometimes when I was busy George Meyers did it for me. Mrs. Meyers did not do any cooking for me as I could not eat the things she cooked. Mary Martin and Sarah Johnson did my washing for me at this time. George Meyers and I had a store for about two years or a little more, we had groceries and dry goods.

And thereupon the following proceedings took place:

“Q. What kind of a store was it?”

“A. It was small, you know.”

“Q. Was it as big as the store George Meyers has got there now?” “A. No, just the side.”

“Q. Just part of it?”

“A. Yes, just part of it; and I built part of that myself, and fixed it up; I cannot stand it; I put new ship lap on, and then we start about two feet down and it was [56] cold weather, and I went to the

(Testimony of Mike George.)

sawmill and got flooring and got 2x8 and put them down, and fixed the shelf and spent more than what the house was worth then and fixed it up; yes, sir.”

“Mr. CHENEY.—I object to that as immaterial.”

“The COURT.—Objection sustained.”

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

I never made any arrangement with George Meyers about the rent at any time, and never heard about it until 10 months ago. He never asked me for money for rent and I didn't owe him \$345.00, but he owed me money. I never said to George Meyers; “I haven't got the money to pay the rent, but I will pay it later on.” I had money all the time. The arrangement we had, I take the stock—you know we make whole business how much a month, and how much stock we got, and the property, the property across the street—how much that was and how much stock we got, how much owing, so we divided all the business and I got \$242.50 left that George owed me. There was no balance struck between \$343.00 and \$242.00. George Meyers has borrowed money from me since that time and paid it back, and he never said anything that I owed him \$345.00 or any other amount. The first time that I heard that Mrs. Meyers claimed I owed her money, was about seven or eight months ago. At that time Mr. Zeigler brought a paper over to the store and said I owed \$650.00. Since

(Testimony of Mike George.)

December 21, 1911, Mrs. Meyers has borrowed \$30.00 from me. She said, "Mike, I am short for bill I want to pay, lend me \$30.00," but she paid that back. At the time she wanted to go below in the summer of 1912, she borrowed \$50.00 from me. [57] I met her on the city wharf, and she told me, "George, I ain't got but five cents." While she was there she asked me for the money. She never paid this back. Sometime near January 20th I loaned her \$150.00. She came in my store, and George Maloof and she and I were there, and she said, "Don't let anybody know I need that \$150.00; let me have it and help me out," so I gave it to her in gold. She never paid this back. Two or three days after I let her have the \$150.00 she came in the store again and I let her have \$175.00, at this time George Maloof and Fanny, the Indian woman, and Mrs. Meyers and myself were there. Mrs. Meyers has never paid this back and she said, "Now, we will fix you." She never said anything to me at this time about owing her for housekeeping, etc. I never saw that book (referring to Plaintiff's Exhibit "A" and "B") before it came up in this case and I never saw George Meyers or Louis Saloum or Mrs. Meyers make any of those entries. I never at any time agreed to pay Mrs. Meyers for anything she did for me, or I never agreed to pay George any rent, or to pay Mrs. Meyers any money for any alleged services, and I never paid them \$45.00 and \$72.00. On December 21, 1911, Meyers owed me the \$242.50

(Testimony of Mike George.)

and also \$250.00 for the property across the street, as we had sold it for \$500.00 and he kept \$258.00, and sued me for the property and took my interest, \$250.00.

On Cross-examination.

(Questions Propounded by Mr. CHENEY.)

Mrs. Meyers only did my washing and took care of my room for three months, after that I moved downstairs and slept on the counter, and as soon as we connected the two buildings, I slept in the room and took care of it myself. I was sleeping in that room before the fire, and when George [58] Meyers went below we were cooking and eating together in my room. I only lived upstairs about three months and after that I lived downstairs. We have no deed for the property but have a receipt for \$250.00, that is the cabin next to the store, but we have a deed for the property across the street. We got this in July, 1910. At the time of the fire the receipt and all the papers got wet. There was about a foot of water downstairs, and it cost something to fix up the store again. After we fixed up the store building it was about 30x40, and I got 800 feet of flooring for it. The little cabin was about 10 feet. I never heard anything about my owing this money for the rent and board until Mr. Zeigler came over there, and the time I was in the office and you said, "I am going to sue you, Mike," and I said, "What for?" and you said, "For the amount of the rent—for the board and the rent." At that time George said to me no rent at

(Testimony of Mike George.)

all because we were going to fix the house—the house, we were going to fix it all up, and it be all right, just the same. I sued George Meyers and Louis down in the Commissioner's Court. At that time he owed me \$242.00 I later brought suit for \$571.00 for the property.

Whereupon Court took a recess until 1:30 P. M., at which time said witness testified further as follows:

I signed the complaint in the Commissioner's Office, dated August 7, 1912, G. C. Winn, Commissioner. I slept upstairs in Mrs. Meyers' room for three or four months and she cooked for me and everything, and then I moved downstairs and slept on the counter for three or four months, and then we bought the O'Connor cabin and I moved into it as soon as it was fixed up. I went into partnership with George about the 18th of October, 1909. [59] I think the fire occurred the first part of 1910, but I did not have it marked down, I cannot read or write the English language, but know my own language. At the time of the fire George Meyers had gone to Seattle and Mrs. Meyers was upstairs and I was downstairs. I don't remember whether the fire occurred in 1909 or 1910.

And thereupon the following proceedings took place in said testimony.

“Q. And at the time of that fire there were two of her children burned up?” “A. Yes, sir.”

“Mr. ROBERTSON.—We object to that as immaterial.”

(Testimony of Mike George.)

“Q. And that didn’t make any impression on your mind so you can tell this jury when that happened—those two children, and lots of the goods that were in the building lost, and still you don’t remember when that fire occurred?”

“Mr. ROBERTSON.—We object to that as argumentative.”

“The COURT.—It is cross-examination.”

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

The fire took place sometime between the last of 1909 and 1910, but don’t remember the exact day of the month. There was lots of excitement when the children were burned. The steps were broken and so the children were burned. I have been in the mercantile business about twenty-four or five years and I have quite a large store at Douglas. I have a pretty good memory concerning business matters, and if I don’t remember the trade, I know them when I see them. I loaned Mrs. Meyers \$50.00 about July 15, 1912, and I loaned her \$150.00 in January, 1915, I never marked it down because I trust her, because she is a [60] good woman, and I want to help her out; you know I know she is short of money, and that is why she was coming to me. Three or four days after I loaned Mrs. Meyers the \$150.00, I loaned her \$175.00, in all \$375.00, without a note or anything, as neither she nor I can write. At one time I loaned her \$30.00

(Testimony of Mike George.)

and she brought that back. I gave George Meyers a check for \$200.00 and he gave me a note, and I put the note in Behrends Bank and they paid it back. Mrs. Meyers was there at the time. George came to me and said, "I need that money pretty bad; I want to send my wife away," that is what he told me. She come with her husband. I said, "Come, we go to Hubbard's and make note down there." She was there and her husband, I don't know who got the money; I make the check to George. George came to me and said, "Please let me have \$500.00 and go to Hubbard and make note"; I say, "George, I cannot do it"; but he needed the money so we went to Hubbards and I gave him a check for \$200.00 and Hubbard made the note.

And thereupon the following proceedings took place:

"Q. You know who cashed the check that you gave for \$200.00?" "A. I don't know."

"Judge GUNNISON.—I object to that as incompetent, irrelevant and immaterial; it doesn't matter who cashed the check; if he gave it to George Meyers that is all there is in the case."

"The COURT.—The mere fact of who cashed the check is not material—the question as to who got the money might be."

To which defendant excepts, and an exception was allowed.

"Q. Don't you know that Mrs. Meyers cashed that check [61] and got the money?"

"A. I gave the check to George."

(Testimony of Mike George.)

“Judge GUNNISON.—We concede it might be material as to who got the money from this man, but who got the money from the check, it seems to me, wouldn’t be material.”

“The COURT.—If it is immaterial it cannot possibly hurt you— if it is material it is admissable; if it is immaterial it cannot hurt you.”

“Judge GUNNISON.—Exception.”

To which defendant excepts, and an exception was allowed.

“Q. Don’t you know and didn’t you know at the time that you gave that check for the \$200.00, that Mrs. Meyers was the one that went to the bank and got the money on the check?”

“Mr. ROBERTSON.—That is objected to for the same reason.”

“The COURT.—Objection overruled, answer the question, if you can.”

“Judge GUNNISON.—Exception.”

To which defendant excepts, and an exception was allowed.

“A. I made the check out to Mr. Meyers. I don’t know who cashed it. I don’t know who got the money. George Meyers said he wanted that money. Mrs. Meyers never talked to me about that \$200.00.

Whereupon the following proceedings took place:

Q. “Now, please tell this jury why it was that you had loaned Mrs. Meyers \$50.00 without any witness or note or anything, and then loaned her, two or three days right after that, \$175.00, and didn’t take any note or anything of the kind, and then when

(Testimony of Mike George.)

they wanted \$200.00 from you you insisted on going up to Mr. Hubbard's office and getting a note for it, why was that?" [62]

"Judge GUNNISON.—We object to that as incompetent, irrelevant and immaterial; it doesn't make any difference why he loaned this woman money or why she borrowed money from him; it is simply a question of whether or not she did borrow money from him."

"The COURT.—Yes, but this is cross-examination—objection overruled."

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

I trusted Mrs. Meyers and wanted to help her out all I could, but I had some trouble with Meyers and could not trust him. I have lent money to lots of people, I help the people out. When George came to my store and wanted the \$200.00, I said, "Come with George Maloof and me to Mr. Hubbard." Mrs. Meyers did not go to Hubbards with us. I didn't talk to Mrs. Meyers about the note. Meyers said to Mr. Hubbard, "I want to give that money to my wife." I don't know what he is going to do with the money. I had some trouble with George, three or four cases about the property, and he said, "No, we no divide it, the property"; and I trust him no more. We had trouble about the property across the road and he claimed it belonged to him and he wanted the rent for it himself, so we

(Testimony of Mike George.)

went to court and I got \$250.00 interest in the property.

And thereupon the following proceedings were had:

“Q. Now, I am talking about this rent for the store that you and George occupied there in Douglas, from October, 1909, [63] to the time you dissolved partnership in December, 1911; that is a little over two years—two years and two months?

A. Yes.

Q. Now, you tell this jury that you never heard anything about that rent? A. No, sir.

Q. There was no talk between you and George ever about it? A. No, sir.

Q. How much you should pay or how much he should pay?

A. Nothing was said about the rent at all.

Q. Now, listen—when you came from the East and went into business with George, you knew George owned the building? A. Yes, sir.

Q. You moved your goods all in there, and you were going into an equal partnership—you understand that, don't you? A. Yes, sir.

Q. And still you tell this jury there was nothing said about whether you should pay your part of the rent, because the building belonged to George?

A. Belonged to George? Because we fixed it up.

Q. Was there anything said about the rent, between you and George?

A. No, sir; everything is fixed up now; we paid the money for the house at that time, and I paid too.

(Testimony of Mike George.)

Q. George owned the building a good many years before you came, didn't he?

A. No, sir; maybe six months, maybe one year, and I paid one-half myself; that time it was partnership, you know, and he paid so much and I paid so much; the time of the business we had arrangement between me and him that we own the property and the amount belonged to me, \$250.00; this building it was \$500.00, \$250.00 to him and \$250.00 to me, [64] and he took the property besides the other property across the street.

Q. Now, listen to my questions. You never heard anything about that rent, and you never agreed to pay for that store—if that is true, I will ask you why it was a little while ago when you were talking about when you started in business there, you said the rent won't be very much between George and you, and you will go in together?

A. George can't say nothing.

Q. You didn't say that? A. No.

Q. I will ask you if you didn't say just now when you were testifying that when you went in business over there George said, "Well, I will let that go for your half of the rent?"

A. No, sir; I never said that.

Q. You didn't say that? A. No, sir.

Q. Didn't say anything like that? A. No, sir.

Q. I will ask you now if George did say, when you went into business—

A. No, sir; there was nothing said at all.

Q. I will ask you now if George did say, when

(Testimony of Mike George.)

you and he went into business, and he owned the store and you didn't own any of it, that he would let you have the rent for nothing?

A. That time the agreement, he said we fix it up, and I pay so much and he pay so much, and everything belonged to us. [65]

Q. He did say, then, that he would let the rent go for nothing?

A. No; he didn't say nothing, no rent at all.

Q. Did he say he would not charge you anything at that time.

A. He didn't say anything except we fix it up.

Q. Didn't say anything about he thought you ought to pay something on that account?

A. No, sir; never say nothing at all."

And thereupon said witness testified further as follows:

George and I never had any agreement as to rent for the store. He owned the store which was worth \$500.00 and I bought half of it. At the time we had the agreement he said, we fix store up and I paid one-half myself and he paid so much and I paid so much. The time of the business we had arrangement between me and him that we own the property. At the time Mr. Robertson [66] was judge he allowed me \$242.00.

And thereupon the following proceedings took place in said testimony:

"A. Yes, the *judgment* allowed me \$242.00—that is what he allowed me that time—it was \$500.00 and something."

(Testimony of Mike George.)

“Q. I am not talking about that at all—do you want to answer the question fairly?”

“A. (Judge GUNNISON.) We submit that question isn’t fair to the witness, and I don’t think that is the proper way to examine a witness.”

“The COURT.—Are you trying to get at the facts in this case, or are you trying to make a good impression? One way or the other, we want to get at the facts and get them before the jury; neither the jury nor the Court care a picayune who is the best lawyer in the case—we want the facts. Ask the witness about the facts in the case.”

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

We had a settlement at the time we dissolved partnership but it was not finished, as he didn’t pay me any money. I sued George and the Court allowed me \$242.00. I sued him for \$571.00, the property across the street, and I got judgment for \$242.00. I lent Mrs. Meyers the \$150.00 some time in January, perhaps the 17th or 20th, after we had quit the business, and then the \$175.00 three or four days afterward. Mrs. Meyers came to my store crying and said she had lost the \$150.00, and I give her \$175.00 and give George Maloof to give to her the money. In May, 1915, Mrs. Meyers sued me for about \$345.00. I asked her about that money and she said, [67] “All right, I am going to fix you.” It is not so that I put in a counterclaim of \$375.00

(Testimony of Mike George.)

against her to offset her claim of \$390.00. She say, "I fix you pretty soon, all right." I tell her I want that money because I was going away, I want that money, and she say that. I told the lawyer what to put in the paper.

And thereupon the following proceedings took place:

"Q. This paper says, January 20th, 1915, \$150.00; February 1st, 1915, \$175.00."

"Judge GUNNISON.—We object to the question as not a fair statement to the witness; the answer says on or about."

"The COURT.—The answer says on or about January 20th he loaned her \$150.00, and it says on or about February 1st—that is not a fair question."

And thereupon said witness testified further as follows:

I was friendly with Mrs. Meyers at the time I loaned her the \$50.00 in 1912, but we had trouble after that.

And thereupon the following proceedings took place:

"Q. Did anything happen to make you unfriendly before you loaned her the \$150.00, and the \$200.00?"

"A. We were friendly at that time, too."

"Judge GUNNISON.—We object to the inference that this man has ever testified that he loaned Mrs. Meyers \$200.00."

"The COURT.—The \$200.00 he has not testified that he loaned her."

And thereupon said witness testified further as follows:

After I loaned her the \$50.00 I had some trouble

(Testimony of Mike George.)

with George and that is why I took the note as I did not trust him. I considered Mrs. Meyers honest and so did not take a note from her. [68]

And thereupon the following proceedings took place:

“Q. Do you want to tell this jury that you were in business over there with George Meyers and his wife for two years, in that store, in partnership, with them and you didn’t sleep there in the same house with them all that time?” “A. No.”

“Q. And that you didn’t eat with them?”

“A. Only three months, that is all.”

“Judge GUNNISON.—We object to that question as placing in the witness’ mouth something which the evidence does not show in the case; his wife was not in any partnership.”

“The COURT.—No, he was not in partnership with Mrs. Meyers.”

And thereupon said witness testified further as follows:

I am willing to testify to the jury that I went into partnership with George Meyers in October, 1909, up to December, 1911, over two years, and that I lived upstairs for the first three months and ate my meals there and then moved downstairs and cooked in the stove for *about or* four months. I was friendly with them all this time. They lived upstairs before the fire and after the fire moved down in the room next to mine for about a week and then moved across the street. I never heard anything about this rent money until Mr. Zeigler came over to the store. I also had a letter from Mr. Cobb about the rent before Zeigler spoke to me, but I did not answer it—I told him to go to court.

(Testimony of Mike George.)

And thereupon the following proceedings took place:

“Mr. CHENEY.—If the Court please, before Mr. George is excused, I am not quite sure whether I asked Mrs. Meyers directly how much these services she performed for Mr. George were worth; I think I asked her that, and I think she said he said he would pay what it was worth, and it was worth \$15.00 a month. I want to recall her and ask her that on the [69] main case. I mention it now so Mr. Robertson will have an opportunity to ask his witnesses about it, so if he wants to ask Mr. George anything about it he may do so.”

“Mr. ROBERTSON.—That is all right, but she is suing on an agreed price.”

On Redirect Examination.

(Questions Propounded by Mr. ROBERTSON.)

This is the check which I gave to Mr. Meyers and that is my signature. Mr. Hubbard made out the check, also the note. Mr. Meyers came to the store and wanted \$500.00 first; George Maloof was there too, and I said, “I will give you \$200.00 if you give me note.”

Defendant's Exhibit was received and marked in evidence as follows:

Defendant's Exhibit No. 1—Check, January 13, 1915, George to Meyers.

THE B. M. BEHREND'S BANK. No. 487.

Juneau, Alaska, Jan. 13, 1915.

Pay to the order of Geo. Meyers.....\$200.00

Two hundred#Dollars

M. GEORGE.

(Stamped across face of check:)

“The B. M. Behrends Bank,

PAID

Jan. 13, 1915.

Juneau, Alaska.”

(Endorsed:)

Geo. Meyers.

Mrs. Meyers.

Dft. Exhibit No. 1.

Received in evidence Dec. 8, 1915.

In cause No. 1277-2, J. W. Bell, Clerk. [70]

That check was dated January 15th, 1915. After the giving of that check I loaned to Mrs. Meyers the \$150.00 and after that the \$175.00. The time that Mr. Robertson was Judge I was allowed \$242.00 but it was more than that. That cross on the paper called the Plaintiff's Exhibit “C” I have never seen before. The statement in the paper that, “The interest on \$364.47 being considered as plaintiff's share of the rent owing and due the defendant on account of the firm occupying the defendant's place of business, together with interest on \$242.50 from the time of said partial dissolution” was for the property across the street. George collected the rent and did not give me my share, and I owned half of the property. Then we went to court about it. The note

for the \$200.00 I gave to Behrends Bank to collect and they collected it and gave me \$5.00 besides as interest. I received Mr. Cobb's letter by mail informing me that I owed Meyers for rent.

Whereupon Defendant's Exhibit 2 was received and marked in evidence as follows:

**Defendant's Exhibit No. 2—Letter, April 9, 1915,
Cobb to George.**

John H. Cobb,
Juneau, Alaska.

April 9th, 1915.

Mr. Michael George,
Douglas,
Alaska.

Dear Sir:

Mrs. Valanda Meyer has placed in my hands for collection a claim against you for services in cooking and washing for you from October 18th, 1909, to December 21st, 1911, at \$15.00 per month, aggregating \$390.00 upon which she admits a credit of \$72.50 leaving a balance due of \$317.50. I am [71] instructed that if this claim is not paid by Wednesday, April 13th, to bring suit upon it. Please let me hear from you.

Very truly yours,

J. H. COBB.

Dft. Exhibit No. 2. Received in Evidence. Dec. 8, 1915. In Cause No. 1277-A. J. W. Bell, Clerk.

And thereupon the witness testified further as follows:

It was after that time Mr. Zeigler came to see me, a short time after. I had several law suits with George Meyers, and some time around the 20th of

January this year I loaned Mrs. Meyers the \$150.00 and \$175.00.

On Recross-examination.

(Questions Propounded by Mr. CHENEY.)

The store we are talking about in this case is the only one the partnership ever did business in. The building across the street was a dwelling-house. The statement which I made under oath: "The interest on \$364.47 being considered as plaintiff's (my) share of rent due and owing to the defendant (Meyers) on account of the firm occupying the defendant's place of business," I claim that was the building across the street, and I sued him for \$575.00 and received judgment for \$242.00. We owned together the store that the firm occupied.

Redirect Examination.

(Questions Propounded by Mr. ROBERTSON.)

At the time it was settled in the Commissioner's Court he owed me something over \$500.00 but I got judgment for \$242.00. There was no agreement that I owed George Meyers anything. [72]

Testimony of Joe Witsell, for Defendant.

Whereupon, defendant in further proof of his case, produced a witness, JOE WITSELL, who first being duly sworn, testified as follows:

On Direct Examination.

My name is Joe Witsell and I am acquainted with Mike George, Mrs. Meyers and George Meyers. I have known Mike George since about 1910. At that time I was living across the street with the Meyers people and Mike George was living in the room next to the store, where he and George Meyers ran their

(Testimony of Joe Witsell.)

business. I saw Mike George do cooking in the little room right off the store, that was about in 1910.

On Cross-examination.

It was about 1910 that I saw him doing some cooking. I call him to sell something, and Mike say, "Wait, a minute, I am going to cook, myself." I don't know what day it was. [73]

Testimony of George Maloof, for Defendant.

Whereupon, defendant in further proof of his case, called the witness, GEORGE MALOOF, who, first being duly sworn, testified as follows:

Direct Examination.

(Questions Propounded by Mr. ROBERTSON.)

My name is George Maloof. I came to Douglas four or five days *days* after the big fire. I am acquainted with Mike George, Mrs. Meyers and Mr. Meyers. George Meyers' family and my family were related in the old country. I am not related to Mike George. I had seen them all in Pawtucket before I came out here. I came to Douglas four or five days after the big fire in 1910. I went to live with Mike George and the Meyers people when I first came. I lived in the front room off the store and Mike lived in the back room. I lived there until Mike and Meyers quit partnership. I run a laundry for about four months and did Mike's washing and a lot of single fellows' washing, also did George Meyer's washing some of the time. At that time Mike used to eat in his room, and Mr. and Mrs. Meyers used to eat across the street. I never saw Mrs. Meyers do any washing or cooking for Mike, and never saw her in Mike's room, and I was around the store quite a bit and

(Testimony of George Maloof.)

sometimes helped them in the store. Louis Saloum and I have been a witness before for Mike. I was in the store about 11 months ago when George Meyers came in and said to me, "Tell Mike to give him \$200.00 and he give him the goods," and I told Mike and he said, "I want good stuff; he give me nothing; I want to take good stuff," and I go back and tell Mike George that George Meyers give him anything he want, and he said, "No," and George Meyers said, "No, I don't give him good stuff; I give him anything I want." George Meyers said, "Give me \$200.00 for two months, and before you go to Ship Creek I give you the money back." [74] I was going to Anchorage and did not want to let him have the money for more than two months, so Mike, George and myself went up to see Hubbard. I was going to make the check and George Meyers said, "Give me three months," and I told Mike, "You don't put my name three months; I want two months." I cannot read or write. Two or three days after the \$200.00 transaction, after George Meyers took the check with him to Juneau and go to Grover Winn's office and Mrs. Meyers was come to Mr. Winn's for divorce. Four or five days after that Mrs. Meyers came into Mike's store and asked for \$150.00 and Mike said, "What are you going to do with \$150.00?" I counted out the money myself and gave it to Mrs. Meyers and she put it in a white handkerchief and put it in her pocket and go in her house. There was nobody in the store but Mrs. Meyers, Mike George and me. I waited for her and we went to the Treadwell wharf and took the 1:30 ferry. After the ferry had gone about 100 feet she

(Testimony of George Maloof.)

said, "Maloof, I lose my money." I say, "Where you lose it?" and she say, "I don't know," and I said, "I keep away from you, you think I got it." I called the conductor and said, "Stop! This woman lose \$150.00." The conductor looked and did not find it and so she got off the boat. About four or five days Mrs. Meyers came into Mike's store again and said, "I lose \$150.00; please help me; my man bothers me all the time; please help me." He gave her \$175.00 and at that time there was Mike, Mrs. Meyers, an Indian woman and myself in the store. Mrs. Meyers put the \$175.00 in her pocket-book and went home. I never touched the money myself.

On Cross-examination.

(Questions Propounded by Mr. CHENEY.)

I never run a gambling game over there in Mike's place in Douglas or we never had a room to play cards in. I work for a living. I have been a witness for Mike several times before in the Commissioner's Court. He couldn't lose a case where I was a witness. Mike has not taken care of me, I have been working in the store for Mike. [75]

And thereupon the following proceedings took place:

"Q. Do you know anything about a case that Mike George is interested in with Mrs. George Meyers, entitled W. G. Hills against George Meyers?"

"Mr. ROBERTSON.—We object to that as immaterial, incompetent and irrelevant; besides, the suit itself would be the best evidence—it is on the records of this court, and if they want to put it in, they can put it in in the right way."

"The COURT.—I don't know anything about it,

(Testimony of George Maloof.)

whether it is going to be relevant or not.”

To which defendant excepts, and an exception was allowed.

“Q. Do you know about a case from Seattle that Mike George is interested in, where they claim that George Meyers got 8 cases of goods at Seattle?”

“A. I know about that case.”

“Judge GUNNISON.—We object to that, if the Court please, as incompetent, irrelevant and immaterial.”

“Mr. CHENEY.—It is preliminary to another question; it is testing his credibility.”

“The COURT.—You may ask him whether or not Mr. George paid his expenses down here.”

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified as follows:

I got broke while up to the westward, and I had \$600.00, and Mike sent me my money, not his money.

And thereupon the following proceedings took place:

“Q. Answer the question—did Mike write you a letter and tell you that he wanted you to come down here and testify against George Meyers in a case about 8 cases of goods from [76] Seattle?”

“Judge GUNNISON.—We object, if the Court please.”

“The COURT.—Ask him the question—Is Mr. Mike George paying your expenses while you are here?”

“The WITNESS.—No.”

“The COURT.—Did Mike George send you any money to come here?”

(Testimony of George Maloof.)

“A. Send me money to come back; he sent my money.”

“The COURT.—He never sent you any money to come here?”

And thereupon said witness testified further as follows:

When I was in Anchorage Mike sent me a ticket to come down here but did not send me any money. He did not say anything about the 8 cases of goods or about my being a witness. I have been a witness for Mike George before but I don't know how many times. When Mike George gave the \$150.00 to Mrs. Meyers he gave it to me first to count over. He said, “Maloof, count it and give it to Mrs. Meyers.”

And thereupon the following proceedings took place in said testimony:

“Q. Now, why did he not give you the \$175.00?”

“Judge GUNNISON.—That is objected to as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness.”

“A. I don't know.”

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

When Mrs. Meyers borrowed the \$150.00 she put it in a white handkerchief. Mike counted the money and then gave [77] it to me and I counted it and gave it to Mrs. Meyers. Mike said, “Maloof, here is \$150.00, give it to Mrs. Meyers.” There was no one else in the store. Mike and I were behind the counter and Mrs. Meyers was on the outside of the counter. She talked for about 5 minutes and then went away.

(Testimony of George Maloof.)

And thereupon the following proceedings took place:

“Q. What did you have to do with that when Mike loaned George \$200.00?”

“Judge GUNNISON.—We object to that as immaterial.”

“The COURT.—Objection overruled.”

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

When Mike loaned the \$200.00 to George Meyers, that was my money and I objected to him having it for 90 days, as 60 days was enough, as I expected to go to Anchorage. I worked in the 300 Mill for two years and three months, but when I came back from Seattle I had rheumatism and I did not work there any more. In 1915 I worked in Mike's store. Mike has a boy working in the store, also. He has three small boys and one large one 16 years old, and he has a wife.

And thereupon the following proceedings took place:

“Q. Where do you sleep?”

“Judge GUNNISON.—I object to that as incompetent, irrelevant and immaterial.”

“The COURT.—Unless he wants to show he lived with Mike George.”

To which defendant excepts, and an exception was allowed.

I lived in the big house with Mike George, but we

(Testimony of George Maloof.)

never run any card games. I was subpoenaed here as a [78] witness. I don't know who gave me the subpoena to come over here. I did not talk with Mike about this case before I came over. He talked to me going as a witness, that was all. I am not related to Mike George but am related to George Meyers. I had a laundry for four months in George Meyer's store building, in the front room off the store, that was in 1910, and I did Mike's washing and everybody's on the beach, all single men, and I got a sign, "Socks free." I was in Seattle when George Meyer's store burned and I started the laundry after I came back, that was in the winter time. Mike's children were in Pawtucket when I was running the laundry.

On Direct Examination.

(Questions Propounded by Mr. ROBERTSON.)

I went back east to Pawtucket and brought Mike's children for him and came back to Douglas after the Meyers' store had burned, and started the laundry. I talked to you in your office about this case in the presence of other people, but I did not talk to Mike about it in the store.

And thereupon the following proceedings took place:

"Q. Did you mean to tell Mr. Cheney you never talked about the case in that way?"

"Mr. CHENEY.—I object to that, suggesting an answer to the witness."

"Judge GUNNISON.—I think we have a right to

(Testimony of George Maloof.)

show that the witness don't understand what Mr. Cheney said."

"The COURT.—Objection sustained."

To which defendant excepts, and an exception was allowed.

And thereupon the witness testified further as follows:

I have been in Ship Creek two months, in Unalaska one [79] month. I could not let George Meyers have the \$200.00 for three months as I expected to go to Anchorage, so Mike let him have it for three months. I talked to Judge Gunnison about this suit. You wrote me a letter and told me to come down and I talked with Judge Gunnison on the boat going to Anchorage. Mike George did not bring that other suit but some people in Seattle and I was subpoenaed by the Marshal. At the time Mrs. Meyers borrowed the \$175.00 I was in the store and I saw it. It was all in gold. At the time Mrs. Meyers borrowed the \$150.00 she asked me to go to Juneau with her as she was going to see Mr. Winn as she wanted to get a divorce, and she gave me \$3.00. At the time Mike gave the \$175.00 to Mrs. Meyers I saw Mike count it and he gave it to her. [80]

Testimony of Mary Martin, for Defendant.

Whereupon, defendant in further proof of his case produced a witness, MARY MARTIN, who first being duly sworn, testified as follows:

On Direct Examination.

(Questions Propounded by Mr. ROBERTSON.)

My name is Mrs. Martin and I am the wife of the man that has the ranch down at the end of Douglas Island. I have lived in Douglas about seven years. I am an Assyrian. I know Mrs. Meyers and Mike George, we came on the same boat from the old country; I used to work for Mrs. Meyers in the old country. We stopped at the same house, Mrs. Meyers, George and me, and he had two little childs. I have a little boy about six years old. I remember that Mike George came to Douglas about 1909, and I did his work, every two weeks I come down and get his clothes. I did his work for about a year. My little boy was about a year old. Sometimes his clothes not ready and I go in his room, and sometimes Mike no got ready, and my husband go to work in Treadwell, and he stop down there and get them for me. Mike was living at that time in the room off the store. Yes, I have been in Mike's room lots of times. Sometimes he call, "Come, Mary, and have a cup of coffee with me" or sometimes call me and I say, "No, thank you, Mike, I had some coffee." Mike paid me for my work, I took some stuff for my work, I don't get no money.

Mike had a little bed and a cook stove, and a

(Testimony of Mary Martin.)

couple of chairs, and that is all he had; I guess he had two old plates, and two cups, that is all.

On Cross-examination.

(Questions Propounded by Mr. CHENEY.)

I did washing for Mike when he come back from the East, he was alone, he had no children. I came over from the old country when George Meyers did and I went there to live with them. Before Mike came out here from the East I got [81] married to a man named Dutchy Martin, and left there. We got a ranch about 9 miles from Juneau, and sometime we live on the ranch, and sometime we got a house in Douglas. I didn't live out on the ranch. I got three houses in town, and when I got married I had a house down on the beach; we live in one, and we move there after we sell the house on the beach, and we bought another place. I cannot tell where it was—just a little place, upon the hill, off by the cemetery in the northeast part of town. My husband, he stay two years on the ranch, and I never go with him, I stay at home, he do the work, and I work in town; I work by hour for three or four families in town, and I been only two years on the ranch. I never washed for Mike then. I remember I was washing for Mike just at the time he come back from the East, because we know Mike, and we stop at his house in Pawtucket; he had a nice little woman, too, and when I come from the old country she done lots of sewing for me and everything, and so when Mike come I work for him, I re-

(Testimony of Mary Martin.)

member that time; he was cooking in his room. I did Mike's washing for him right after he came from the East, I guess in 1909, I remember I done his washing for him for one year. He was living upstairs with the Meyers. I remember it; every time I bring clothes he was kicking, and I says, "What is the matter, Mike?" He said, "Mary, you charge me too much." I said, "Well, you are rich." Yes, he was living upstairs about three months, and after he come down he used to sleep downstairs; I remember he had a little mattress and slept on the counter at night-time, and daytime put it away. Mrs. Meyers didn't do the washing, then, for Mike George after Mike came from back East but I do about one year, yes; and after I quit I don't know who got it after that. I had no trouble with George Meyers and Mrs. Meyers at all. I give him some money for him, and I asked him for the money, and he don't pay it, and that is all I can do, bring suit. Me and Meyers and Mrs. Meyers [82] was good friends, never trouble. I left George Meyers' place when I got married, and go to stay in my own house. I used to go to work for Meyers all the time for three years in his house, and we were good friends. Well, he take \$350.00 from me, for one year. The time was coming, and I asked him for the money and he didn't get it, and next year I change the papers again, and make it that time three years. "Meyers," I said, "I want to build a little house, I got to have a little house and stay in town so I can send my boy to school." "I cannot get it," he said, and

(Testimony of Mary Martin.)

he didn't care, and that is all. I never had any trouble with Mike George. I have no trouble with nobody. I like everybody just the same. Mike George don't know anything about this suit. I come myself; I come to Juneau in a gasoline boat and I come here. Mike didn't put up a bond for me, I didn't see him, I do it myself, that is all, so I give the money and he don't know anything about it.

Redirect Examination.

My little boy was about six years old at this time.

[83]

Testimony of Sarah Johnson, for Defendant.

WHEREUPON, defendant in further proof of his case, produced a witness, SARAH JOHNSON, who first being duly sworn, testified as follows:

On Direct Examination.

(Questions Propounded by Mr. ROBERTSON.)

My name is Sarah Johnson and I live in Douglas. I am acquainted with Mike George, Mrs. Meyers and Mrs. Meyer's husband, George Meyers. About five years ago I started in a hand laundry over there, and that is how I got to know him. I went in the store there and asked him if he could give me his laundry, and he said yes. About a week after I started the hand laundry I began to do Mike's washing every two weeks, and I did it for about two years. Sometimes my husband go there when I got no time, I tell my husband to stop in and get his clothes. Sometimes overshirts, sometimes two pairs of socks, sometimes pillow-cases, not all

(Testimony of Sarah Johnson.)

the time, but I got his underwear, and undershirt and pair of socks and one pillow-case. Mike paid me for this work. I do not do his washing now. I very seldom patched his clothes; he always had good underwear; sometimes button off and I sew it on.

Cross-examination.

(Questions Propounded by Mr. CHENEY.)

At the time I did Mike's washing he was living in a room back of the store. He lived there the whole two years that I did his washing and I commenced about 1910. I used to go into the Meyers' store, and I saw Mr. Meyers and Mrs. Meyers in there. I was born in Juneau and then I went away, I went down to Seattle, and that is the time, about five years ago I come back from Seattle, and that is the time I start the laundry there. It is going on five years since I come to this town; I come to Douglas the last part of July—next July it will be five years. It is only a few months until July, it is going on five years. [84]

Testimony of Fanny Williams, for Defendant.

Whereupon, defendant in further proof of his case, produced a witness, FANNY WILLIAMS, who first being duly sworn, testified as follows:

On Direct Examination.

(Questions Propounded by Mr. ROBERTSON.)

My name is Fanny Williams. I am acquainted with Mrs. Meyers and Mike George. I know Mike George's store over in Douglas and I was in there. I have seen Mrs. Meyers in there sometime last win-

(Testimony of Fanny Williams.)

ter. I saw Mrs. Meyers take some money from the counter and put it in her pocket-book. I never put down anything about what happens.

And thereupon the following proceeding took place in said testimony:

“Q. Do you know where the money came from?”

“A. Mike put the money on the counter, and Mike told me afterward.”

“Q. Did you see him do that?”

“Mr. CHENEY.—I object to that and ask that it be stricken out.”

“The COURT.—Yes, it will be stricken, whatever Mike told her.”

And thereupon said witness testified further as follows:

Mrs. Meyers, Mike, Maloof and myself were there at that time. They were talking in their own language and I did not understand them. Mrs. Meyers was in the store when I went in, and I saw her take the money from the counter but I didn't see who put it there.

On Cross-examination.

(Questions Propounded by Mr. CHENEY.)

My name is Fanny Williams. I understood what my lawyer said to me.

Redirect Examination.

(Questions Propounded by Mr. ROBERTSON.)

I don't know what kind of language these people were talking in at that time. They were not speaking English. [85]

(Testimony of Fanny Williams.)

On Recross-examination.

They were not talking in English, Mike, George, or any of them. I don't know what time this took place. I saw Mrs. Meyers take some money off the counter, but did not see who put it there. That is all I know about it. [86]

Testimony of G. M. Bothwell, for Defendant.

Whereupon, defendant in further proof of his case, produced a witness, G. M. Bothwell, who first being duly sworn, testified as follows:

On Direct Examination.

(Questions Propounded by Mr. ROBERTSON.)

My name is G. M. Bothwell. I am employed on the ferry-boat "Alma" as purser, and have been in their employ for the last 18 months. I have seen Mrs. Meyers and know who she is. I remember the occasion when we were leaving Treadwell and coming this way toward Douglas, and she got on the ferry at Treadwell, and between Treadwell and Douglas she made the cry or alarm about losing \$150.00, and I asked her how she had it, whether it was in her purse or how it was, and she said no, she had it in her handkerchief. She got on the ferry and went in the after-cabin and stayed on the star-board side of the ladies' cabin over there; she came up in the engine-room or the little cabin over the engine and said she had lost this money, and I went down in the after-cabin and looked to see if I could find it, I don't think there was anybody in there, if I remember right, but her and some man who got on

(Testimony of G. M. Bothwell.)

with her; who this man was I don't know, I have often seen the man though. I think I would be able to identify him if he is in the courtroom. This happened several months ago, or perhaps a year. I am not positive but I think that is the man (referring to George Maloof).

Cross-examination.

(Questions Propounded by Mr. CHENEY.)

I think Mrs. Meyers got on at Treadwell and got off at Douglas when she discovered the loss of her money. I remember of her relating the amount, \$150.00, tied in a handkerchief. I went in the after-cabin, because she got on the starboard side and went down in the after-cabin, and that is the only place she was until she got off at Douglas. That was my last trip on the boat. [87]

Testimony of R. R. Hubbard, for Defendant.

Whereupon, defendant in further proof of his case, produced a witness, R. R. Hubbard, who first being duly sworn, testified as follows:

On Direct Examination.

(Questions Propounded by Mr. ROBERTSON.)

My name is R. R. Hubbard and I am a resident of Douglas. I know Mike George, Mrs. Meyers and Mrs. Meyers' husband, George Meyers. I have known each of those parties four or five years, something like that. I recognize that check which is marked Defendant's Exhibit No. 1, as being my handwriting. The circumstances of making that check came about something like this—Mike George

(Testimony of R. R. Hubbard.)

came in with George Meyers and Mrs. Meyers and he wanted to make out a note, and stated if he had to sue George Meyers he would pay all costs, and I think there were \$50.00 attorney fee in the note; and when the note was signed, George Meyers wanted Mike George to make the check payable to Mrs. Meyers, so I advised against that, and I said, "Make it payable to George Meyers and he can endorse it over to Mrs. Meyers"; and I think in making the note there wasn't to be any interest for a certain time, and they said to leave the interest off, and I told him they had better put the interest after maturity or something like that, and I think it was finally wound up in that way. Mrs. Meyers did not sign the note.

And thereupon the following proceedings took place:

Mr. ROBERTSON.—We make a demand on counsel at this time for the cancelled note, if the Court please.

Mr. CHENEY.—I would like to accommodate counsel, but Mr. Meyers has been to the bank and tried to get that note, and Mr. McNaughton said he could not find it; he gave him this slip and George has a receipt for \$205.00, and that is all he could get.

Mr. ROBERTSON.—Then you admit that the note was simply signed by George Meyers? [88]

Mr. CHENEY.—The note?

Mr. ROBERTSON.—Yes.

Mr. CHENEY.—We admit they got the \$200.00.

(Testimony of R. R. Hubbard.)

George Meyers signed the note but Mrs. Meyers did not.

And thereupon the witness testified further as follows:

A couple of hours afterwards on the same day, George Meyers, and I think it was Mr. Saloom, came back, and George was very much worked up and wanted to know why I didn't make up the note and check the way he said, without interest, and make the check payable to Mrs. Meyers, and I told him according to my idea of business that would not be right, and if he wanted to do business that way to go to somebody else and have it done.

Cross-examination.

(Questions Propounded by Mr. CHENEY.)

Mrs. Meyers was present when this paper was drawn up. I did not hear Mike George testify. I suggested to them, when they were going to have the money paid over from Mike George to Mrs. Meyers, that the best way was to make it out in George's name because he was going to give the note, and have him indorse it over to Mrs. Meyers, which he did. Mr. Meyers got the check for \$200.00 in the presence of Mike George, and they were in my office at the time. They had some conversation among themselves, she was going away or something and wanted the money, perhaps for an operation, and they didn't have it. George Meyers wanted to borrow the money for his wife, and he endorsed the check over to her,—he signed it over to her in my presence and in the presence of Mike, and when the

transaction was completed Mrs. Meyers had the check for \$200.00. [89]

Testimony of Jake Saloum, for Defendant.

Whereupon defendant in further proof of his case, produced a witness, JAKE SALOUM, who, first being duly sworn, testified as follows:

Direct Examination.

(Questions Propounded by Mr. ROBERTSON.)

My name is Jake Saloum and I live over in Douglas. I am here under subpoena. I am related to Mike George and George Meyers. Louis Saloum is my brother. I came to Douglas the 7th of July, 1914. I have seen this book before marked Plaintiff's Exhibit "A" and "B." I first saw it at George Meyer's house in Douglas about a year ago. George Meyers and Mrs. Meyers, Louis Saloum and myself were present at that time and also Antone Meyers. They were putting down items in that book against Mike George. I saw George Meyers go into the office in the store and get this book, and someone said it was too new so he took it back, and they said, "That is all right, that looks old enough." They were very poor at figuring and asked me to figure the account. I figured 26 months at \$15.00 a months as \$390.00. George Meyers and Louis Saloum and Antone Meyers were making suggestions and George Meyers said, "We will put down that amount, and we will put down that Mike George had paid on each account a few months," and I said, "What is that?" He said, "That is a good point, if a person pays a little on each account it will force him to pay the rent." I said, "You fellows are a

(Testimony of Jake Saloum.)

little more posted on law than I am."

And thereupon Plaintiff's Exhibits "A" and "B" were marked and received in evidence as translated by the witnesses George Meyers and Louis Saloum in their testimony for the plaintiff on her case in chief. [90]

Cross-examination.

(Questions Propounded by Mr. Cheney.)

I have a shoe store in Douglas. Mike George did not set me up in business or lend me any cash but gave me some credit. I started in business just as soon as I came to Douglas and that was about 15 or 16 months ago, and before I knew Mike George. I testified that I was present when George and Mrs. Meyers and Louis Saloum were fixing up that book.

And thereupon the following proceedings took place:

"Q. Now, I am asking you if Mike George, since that time has not set you up in business, or rather if he has not extended credit to you or helped you to start a business in Douglas?"

"Judge GUNNISON.—We object to that as incompetent, irrelevant and immaterial, and a repetition of questions already propounded and answered by the witness."

"The COURT.—The time was not fixed in the other question. I understand the question now is whether or not since the time he has been testifying to, Mr. George has not set him up in business."

"Mr. CHENEY.—Yes, sir."

"The COURT.—Objection overruled."

(Testimony of Jake Saloum.)

To which defendant objects, and an objection was allowed.

And thereupon said witness testified further as follows:

Mike George spoke to agents to give me credit so I could expand by business and get more goods for my store. That was since the time I was in George Meyers' store and they fixed the book. [91]

And thereupon the following proceedings took place:

"Q. You were able to get credit then all right after Mike George spoke to these people, weren't you?"

"A. I have always been able to."

"Judge GUNNISON.—We object to that as incompetent, irrelevant and immaterial."

"The WITNESS.—I have always been able to, previous to that."

"Judge GUNNISON.—There is no allegation that Mike George gave this man credit, and therefore, I think if Mike George spoke to the agents for credit, it is immaterial, and I think the question *be* propounded is immaterial."

"The COURT.—I think it material for what it is worth, to show the relation, the gratitude, the feeling between him and George."

To which defendant excepts, and an exception was allowed.

And thereupon witness testified further as follows:

I was able to get credit from the wholesale houses

(Testimony of Jake Saloum.)

after Mike spoke to the agents and told them I was honest. We have always been friendly with the Meyers people and are still friendly.

And thereupon the following proceedings took place:

“Q. Now, Mr. Saloum, did you protest against any such thing as fixing up the books with an account in it against Mike George over there?”

“Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial.”

“The COURT.—Objection overruled.”

“Judge GUNNISON.—Exception.”

To which defendant excepts, and an exception was allowed. [92]

And thereupon said witness testified further as follows:

I did not protest against them fixing up the book against Mike but it gave me an opinion of the people that were putting up that stuff. They asked me to do some figuring for them and I did. I didn't discuss what would be the best way to do it. My brother said to me, “We will go down and visit George; he has been here in the daytime and asked me to come down with you,” and I said, “Why?” He said, “Oh, I don't know.” I told them when they were discussing it about the petter way to do it and I said, “You fellows seem to be well posted,” but I had a very poor opinion of them. They did not bring me down to put up the job but asked me to do the figuring, and there is no objection to figuring that for anyone. I did

(Testimony of Jake Saloum.)

not discuss this matter with you but I was in your office with George Meyers and Louis Saloum and heard their discussion about the account with Mike George that he owed for rent and the account he owed Mrs. Meyers for services for keeping house. I didn't tell you at that time this was a put up job and the book wasn't a straight account because I didn't think it was my place to.

And thereupon the following proceedings took place:

“Q. As a matter of fact, Mr. Saloum, didn't you make a copy of that book yourself, of those items in that account, and show it to me there in the office?”

“A. I don't remember that at all?”

“Q. You would not dispute that?”

“A. I cannot remember it.”

“Q. You would not swear that you did not?”

“A. No, I cannot remember it.”

“Mr. ROBERTSON.—If the Court please, if this man has such a copy in this man's handwriting it is no more than right that he should exhibit it.”

“The COURT.—It is not necessary that he do so.”

To which defendant excepts, and an exception was allowed. [93]

And thereupon witness testified further as follows:

I did not discuss this account against Mike with anyone as I considered it was not my place to. I heard them discuss about the rent and board at that time and knew all about it. I understood the rent they were talking about was for half of the store they

(Testimony of Jake Saloum.)

had occupied as partners.

And thereupon the following proceedings took place:

“Q. Jake, so you heard about this account for rent for a considerable period before this transaction—I understand you had heard them discuss it before?”

“A. About the account?”

“Q. Yes.”

“A. No, sir.”

“Judge GUNNISON.—That is not proper cross-examination.”

“The WITNESS.—Not about the account, I heard about partnership.”

“The COURT.—I think it is cross-examination, because it relates to the subject of the very entries that are in dispute.”

To which defendant excepts, and an exception was allowed.

I did not go right after this was done and tell Mike George about this book being fixed up against him, but when this case came up I said something and he knew that I knew about it being fixed up. I told him I did not like to mix up as I was a relative of both he and George Meyers and he told me he would subpoena me and I would have to come and I could testify as I liked.

And thereupon the following proceedings took place:

“Q. This suit was only brought in the last three or four months.” “A. Yes, I know.”

“Judge GUNNISON.—We object to the state-

(Testimony of Jake Saloum.)

ment of counsel, because the records don't show that this suit was [94] brought in the last three or four months, they show it was brought in May, 1915."

And thereupon said witness testified further as follows:

I did not mention this to Mike until recently when the papers were served on him, and he said, "Well I will subpoena you." I have always been friendly with Mike and often met him as we were both doing business in Douglas, but I did not mention this account to him about fixing it up. I didn't take no part in the job at all. I might have told him that I had been to the lawyer's office with George and Louis. I kept this fact to myself until they started suit and then I gave him a couple of hints. Mrs. Meyers, George, Antone, Louis and myself were present at the time the book was fixed up. We were in the kitchen and so when anyone came in the store Mrs. Myers or Mr. Meyers went out and waited on them. They never knew that I was on friendly terms with Mike, as they tried to keep me away from him for a long time. I had never been to see him often, but went down with my brother to return a visit once the week after I came here. I had heard that my brother used to be friendly with Mike George but that was before I came to Douglas.

Redirect Examination.

(Questions Propounded by Mr. ROBERTSON.)

I speak to George Meyers and his wife when I meet them. I have no ill-feeling against them, as

(Testimony of Jake Saloum.)
they have done me no harm.

Cross-examination.

(Questions Propounded by Mr. CHENEY.)

I remember the occasion when I came to your office over Burford's store with Louis Saloum and George Meyers.

And thereupon the following proceedings took place: [95]

“Q. And didn't you at that time have a piece of paper—I think it was white paper, with an account on it, and didn't you show that to me at that time—an account about the rent and the claim that Mrs. Meyers has now at this time against Mike?”

“Judge GUNNISON.—We object to that as incompetent, irrelevant and immaterial, it is indefinite as to time, persons present, and there is no identification as to anything that was said about it.”

The COURT.—I cannot tell yet, Judge Gunnison; objection overruled.

“Judge GUNNISON.—Exception.”

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

About a year ago my brother Louis and I were at a picture show and my brother asked me to go down to Meyers' place with him and pay a visit. I did some figuring for George Meyers but I do not remember having copied the items off on a piece of paper. I know that account was made that night. I did not take much interest in the case that day we

were in your office and so do not recall what was said or how long we were down there. We were in your office from 5 to 15 minutes. We discussed this same account. I remember what the business was, but not what the words were.

Whereupon Defendant's Exhibit No. 1 received in evidence and marked Defendant's Exhibit No. 3, as follows: [96]

Defendant's Exhibit No. 3—Answer to Amended and Supplemental Complaint, in George vs. Meyers, in Commissioner's Court.

In the United States Commissioner's Court for the District of Alaska, Juneau Precinct.

MICHAEL GEORGE,

Plaintiff,

vs.

GEORGE MEYERS,

Defendant.

Comes now the above-named defendant and answering what is termed "Amended and Supplemental Complaint" of plaintiff herein, denies and alleges as follows, namely:

I.

Defendant admits the allegations contained in paragraph one of said Amended and Supplemental Complaint.

II.

Defendant denies each and every allegation contained in paragraph two of the said Amended and Supplemental Complaint.

III.

Answering paragraphs three and four of said Amended and Supplemental Complaint, defendant admits that the plaintiff paid for a bill of goods bought by defendant from Elias George & Brothers for the amount of THREE HUNDRED SIXTY-FOUR DOLLARS and FORTY-SEVEN CENTS (\$364.47), but avers that said amount was included as part of the consideration to be paid and performed by the plaintiff for his interest in the copartnership of George Meyers & Company.

IV.

Answering paragraph five of said Amended and Supplemental Complaint, defendant admits the allegations in said paragraph contained.

Dft. Exhibit No. 3. Received in evidence Dec. 9, 1915. In cause No. 1277-A. J. W. Bell, Clerk.
[97]

V.

Answering paragraph six of said Amended and Supplemental Complaint, defendant admits that there was a full and complete dissolution of the mercantile business theretofore conducted under the firm name of GEORGE MEYERS & COMPANY, and a complete accounting and settlement was then and there had of the partnership affairs, and any and all moneys paid into said partnership affairs, and any and all moneys paid into said partnership by either the plaintiff or defendant were then and there accounted for, adjusted and settled; admits that the plaintiff was to take the stock of merchandise for which he received a Bill of Sale; admits that plaintiff

executed a deed to defendant for the store property but denies that the plaintiff had any interest in said store property to convey or that said store property was in any manner or at all considered in the settlement or dissolution of said partnership, other than that the plaintiff was allowed a certain amount, to wit: about the sum of TWO HUNDRED AND FIFTY DOLLARS (\$250.00) for his services in helping to erect an addition to said store property, said store property at all times mentioned in the Amended and Supplemental Complaint and long prior thereto being the absolute property of the defendant; admits that the plaintiff and the defendant should contribute equally toward the payment of all bills owing by the firm; admits that defendant was to receive all accounts due said firm, but denies that he agreed and promised to pay to plaintiff the sum of FORTY DOLLARS (\$40.00) for his interest in the bills and accounts owing to said firm or any other sum; and avers that under a Bill of Sale, dated the 21st day of December, 1911, given by George Meyers, the defendant herein, to Michael George, the plaintiff herein, as part of the consideration for the execution of said Bill of Sale by said George Meyers to the [98] said Michael George, the said Michael George covenanted and agreed that the said George Meyers should collect all bills due and owing to the said firm of GEORGE MEYERS & COMPANY. Denies each and every other allegation in said paragraph six in said Amended and Supplemental Complaint contained.

VI.

Denies each and every allegation contained in paragraphs seven and eight of said Amended and Supplemental Complaint.

VII.

Answering paragraph nine of said Amended and Supplemental Complaint, defendant denies each and every allegation in said paragraph contained; denies that there is due the plaintiff the sum of FIVE HUNDRED SEVENTY-ONE DOLLARS and THIRTY-SEVEN CENTS (\$571.37), or any other sum or sums whatsoever.

AND FOR AN AFFIRMATIVE DEFENSE TO THE ALLEGATIONS CONTAINED IN SAID AMENDED AND SUPPLEMENTAL COMPLAINT, DEFENDANT ALLEGES:

I.

That on or about the 21st day of December, A. D. 1911, the partnership which had theretofore existed between the plaintiff and defendant and which said partnership was designated and known under the firm name and style of GEORGE MEYERS & COMPANY, was by said plaintiff and defendant herein mutually dissolved, and at the time of such dissolution, all the bills, accounts, choses in action and any and all differences between defendant and plaintiff were taken into consideration and were fully settled, paid and satisfied and formed the basis of such dissolution of said partnership between said plaintiff and defendant; and any and all claims which either party, the plaintiff or defendant, may have had against the other, were fully settled, paid and satis-

fied in full by reason of said absolute dissolution of said partnership. [99]

WHEREFORE, defendant prays that the plaintiff go hence without relief and that defendant have his costs and disbursements herein.

WINN & BURTON,
Attorneys for Defendant. [100]

United States of America,
District of Alaska,—ss.

Before me, the subscribed, personally appeared George Meyer, who being first duly sworn on oath deposes and says I am the defendant in the foregoing entitled cause; that I have heard read the answer to the amended and supplemental complaint herein; know the contents thereof, and verily believe the same to be true.

GEO. MEYERS.

Subscribed and sworn to before me this 22 day of December, 1912.

(Notarial Seal) NEWARK L. BURTON,
Notary Public for Alaska.

[101]

**Testimony of L. Anderson, for Plaintiff (In
Rebuttal).**

Whereupon to further prove her case, plaintiff called in rebuttal the witness L. ANDERSON, who, being first duly sworn, testified as follows:

Direct Examination.

(Questions Propounded by Mr. CHENEY.)

My name is Leander Anderson. I have lived in Alaska since the 1st of April, '98. I know George Meyers and his wife and Mike George. I lived near them on the beach, about 600 feet. I am 67 years

(Testimony of L. Anderson.)

old. I follow carpentering. I remember seeing the fire one Sunday morning which burned the upper part of George Meyer's store and also his two children.

And thereupon the following proceedings took place in said testimony:

"Q. Did you ever put an addition on to George Meyers' store building?" "A. Yes."

"Mr. ROBERTSON.—We object to that as immaterial, may it please the Court."

"The COURT.—I suppose he is trying to fix a date."

"Mr. CHENEY.—Yes, that is in rebuttal of Mike George's testimony that there was no room to sleep in and that he had to sleep on the counter.

To which defendant excepts, and an exception was allowed.

And thereupon witness testified further as follows: I did some work on George Meyers' store on the side towards Treadwell, the side on the south. There was a building standing close to this one and I connected the two and made it into one building. I did this work for Mr. Meyers. Mr. Meyers and Mike George were in business together at that time. I did this work before the fire, sometime in the early part of the summer. I don't remember the exact date, it was warm weather. There was a bedroom in the [102] building which we attached on to the store building. It was a two room house, an old house; one room we fixed up as a great big bedroom, with a bed and stove in it, and Mike George slept in there—he said he was sleeping in there. This was before the fire and it was warm weather. I filled in be-

(Testimony of L. Anderson.)

tween; one wall alongside this wall and another one alongside the railroad tract. I put a hole into the wall into the old store so that they could go in between the two, and the partition I put in connected the store too. I also put in a door. I understood it to be a regular bedroom, it looked like it.

Cross-examination.

(Questions Propounded by Mr. ROBERTSON.)

I did this work in the summer before the fire.
[103]

Testimony of George Meyers, for Plaintiff (In Rebuttal).

Whereupon, to further prove her case, plaintiff called in rebuttal the witness, GEORGE MEYERS, who being first duly sworn, testified as follows:

On Direct Examination.

(Questions Propounded by Mr. CHENEY.)

The fire at our store occurred on September 18, 1910. I marked it down in the house as I wanted to know the time when the children are dead. Mr. Anderson had fixed up the house before this time, before the children were burned, several months before. He fixed the old house and joined together two rooms, one room close to the house that he fixed, and I have a house on this side, and I have joined together two rooms that we bought from O'Connor, and what he fixed, Mr. Anderson, was right in the middle between the joining of my store, on this side two rooms. When he got it fixed there were two rooms on the south side of the store. I had it fixed for a bedroom, papered all over, nice bed, table. Mike occupied this as a bedroom, and we lived up-

(Testimony of George Meyers.)

stairs but he ate with us. After the fire we moved across the street from the store, we bought a house from Mr. O'Connor, one story and a half, and we lived downstairs; we rent upstairs, and Mike ate with us. From the time that Mike and I started in business together in October, 1909, Mike took his meals upstairs with us and also slept upstairs for three or four months until we get the room fixed up downstairs. The time of the fire I come back from Seattle because we have everything all mixed up; we all sleep in Mike's room for a while until we have another room fixed up across the street. As soon as the room across the street was fixed we moved over there and Mike took his meals with us.

And thereupon the following proceeding took place in said testimony: [104]

"Q. Now, George, Mr. Jake Saloum has testified in this case—you didn't hear his testimony?"

"A. No, I was outside."

"Q. He has testified that he came down to your store about a year ago with his brother, Louis, and that you and Mrs. Meyers were there, and Antone Meyers and himself and Louis Saloum—that you were all there in the store—and that you said you wanted to fix up an account against George in a book, and that you went out and got a book in the other room, and came back, and somebody said that was too new a book, that you better put it in the other book, and you went out and got an older book—this book (referring to exhibit "A" and "B")—and that you wrote down in that book those items that appear there?"

"Judge GUNNISON.—Now, if the Court please,

(Testimony of George Meyers.)

we object to this method of examination of witness, the recital of all the testimony of some other witness, also as leading and suggestive, and I apprehend multifarious; it does not seem to me that is the proper way to examine a witness."

"The COURT.—No, it is not the way to examine the witness; the way to examine him is not to prefix it by what has been said before—ask the witness—direct his attention to such a time, and ask him what happened on that occasion."

"Q. Now, George, I will ask you if it is true that you did, down there in your store, take a book out of the other part of the store—this book here—and bring it in there, and in the presence of those persons I have mentioned, and write down the accounts that appear in this book in your Syrian language, this that you have sworn to before—I will ask you if that is true?" "A. Is true?"

"Q. Yes." "A. One day— [105]

"Mr. ROBERTSON.—We ask for an answer of that yes or no."

"The COURT.—Answer the question—state whether it is true or not."

"A. It was Sunday; Sunday we go to the show; there was no place to go, and we go to the show, me and my wife and my brother—"

"Judge GUNNISON.—We object to this and move it be stricken as not responsive to the question."

"The COURT.—Ask him the question."

"The WITNESS.—That is the time it was."

"The COURT.—Now, you asked the witness whether or not that happened and he said no, it didn't

(Testimony of George Meyers.)

happen. Now, you ask him what did happen, and direct his attention to the time Jake Saloum came down there."

"Q. Tell the jury in your own way whether Jake Saloum came down there to your place, and, if he did, what happened?"

"Judge GUNNISON.—We object to that question on the ground that it is indefinite—if Jake Saloum came down there to your place and what happened."

"The COURT.—Fix the time."

"Q. I will fix it as near as Jake Saloum fixed it. When Jake Saloum says he came down there about a year ago to your place of business, tell this jury what happened."

"A. That night the show, and we go down there together, me and my wife and my brother, and we meet Louis Saloum and his brother, and we go together; there is a sidewalk running from the sawmill to my store, and another sidewalk going to Louis Saloum's, to his house and store, "Mr. Saloum, will you please come down?" and I say to Mr. Jake Saloum, "Will you please come down to my house?" And he say, "All right," because every Sunday we go down to his house, and Louis say his brother come down too. Me, my brother and my wife, and all go down to my house, and we sit down, and we have a fire and I told Jake Saloum, because he read a little [106] English, I told him, "Jake, will you please transfer this book for me from this language to English?" He say, "Yes, sure." We were all sitting down there, me and my wife and my brother and Louis Saloum and his brother in one room. I say, "All right, I go down for the book," and he

(Testimony of George Meyers.)

fixed his paper, and he told me, "All right, I fix it for you." I went down and showed it to Mr. Cheney, and I explained to Mr. Cheney about this book. He said all right, and he copied the piece of paper and he wrote it in English. After one day or two days we go down, me and Jake and his brother—"

"Judge GUNNISON.—We object to this as not responsive to the question. He asked what happened on that night, and now he is about to relate something which he says happened two or three days afterward."

"The COURT.—Just answer the question of what happened on that night in the presence of those people."

And thereupon said witness testified further as follows:

I did not say anything to Jake Saloum that night about fixing up a job on Mike George. I have had the book for a long time and used to mark down when something was paid. Mike knows the book also.

And thereupon the following proceeding took place in said testimony:

"Q. When you requested Jake to do that, did he do it?"

"Judge GUNNISON.—I object to that as incompetent, irrelevant and immaterial, and not rebuttal."

"The COURT.—I don't know, he may testify to what happened on that occasion."

"Q. Did Jake Saloum write that at that time on a piece of paper, in English?"

"A. Yes, he write it, and fetched it to you at that time when he talked to you, and he remembers it too."

(Testimony of George Meyers.)

“Q. Did you, while Mr. Saloum was there, and your wife and your brother and Louis Saloum, go out in the other room, [107] the storeroom, and get a book and bring it in there to that room where you all were, and did anyone say that was too new, if you were going to put up this job you better get an older book?”

“Judge GUNNISON.—I object to that as incompetent, irrelevant and immaterial, not rebuttal; it is leading, suggestive, and there is no foundation laid for any impeaching question.”

“The COURT.—The only possible objection to the question is that it is leading, and that is not a very good objection because it is redirect examination. You can direct the person’s attention to some specific thing and ask him if he said so and so or did so and so—objection overruled.”

“Judge GUNNISON.—Exception.

To which defendant excepts and an exception was allowed.

“Q. You may state.”

“A. What was the question?”

“Q. When you were there in the room did you go out in the storeroom and get a book, a new book—some kind of a book—and bring it in there, and did someone say that that was too new to write this stuff in, and that you had better get an older book, and then did you go out and get this older book and bring it in and write this in it?”

“Judge GUNNISON.—I object to that as multifarious.”

“The COURT.—The trouble with the question is simply this, that it contains a whole lot of things in

(Testimony of Mrs. George Meyers.)

one question. You ask a dozen questions all coupled together, and say is that so; he can say no, that is not so, but he might mean by that that there is some part of it that is not so. Now, if you will segregate your questions, and not put so many questions into one question, this witness can answer intelligently."

"Q. George, did you go out in the store and get a book and bring it back into the room, and then go out and get [108] another book and bring that book into the room?"

"Judge GUNNISON.—The same objection.

"The COURT.—The objection is overruled—answer the question yes or no, did you do it?"

"A. No, I didn't do it; I fetched that book there."

To which defendant excepts and an exception was allowed.

And thereupon said witness testified further as follows:

That is the only book I brought in and no one said that it was too new and that I had better put the stuff in an old book. Jake Saloum did not say in our presence, "You may know more about law than I do." George Maloof never run a laundry in my store.

And thereupon the following proceeding took place in said testimony:

"Q. If Maloof had run a laundry in your store, or in those rooms, and washed clothes for people for five months, you would know it, wouldn't you?"

"Judge GUNNISON.—We object to that as incompetent, irrelevant and immaterial, suggestive, *argumentive*, and self obvious."

"The COURT.—Objection overruled."

"A. No, sir; he didn't have no laundry."

(Testimony of Mrs. George Meyers.)

To which defendant excepts and an exception was allowed.

And thereupon said witness testified further as follows:

Mrs. Meyers was present at the time that Mike loaned the \$200.00, and I endorsed the check over to her.

No cross-examination. [109]

Testimony of Louis Saloum, for Plaintiff (In Rebuttal).

Whereupon to further prove her case plaintiff called in rebuttal the witness, Louis Saloum, who being first duly sworn, testified as follows:

Direct Examination.

(Questions Propounded by Mr. CHENEY.)

“Q. Louis, I will ask if you remember an occasion when something like a year ago Jake Saloum came down to George Meyers’ store and there was some talk about some account against Mike George?”

“A. Yes.”

“Q. I will ask you to state to the jury what happened there at that time—just state to the jury what took place there at that time.”

“A. One Sunday night we were at the moving picture show, me and my brother, and Mr. Meyers and his wife and his brother.”

And thereupon said witness testified further as follows:

When we came out of the show George Meyers asked us to come down to his house for an hour or so and he said, “I was up to the lawyer’s office and put my book of account against Mike George, so the lawyer tell me he cannot understand our language,

(Testimony of Louis Saloum.)

and I cannot explain very good myself, so will you kindly transfer that from our language to English?" So Jake transferred this and a couple of days afterwards we came to Juneau to see Mr. Cheney.

And thereupon the following proceedings took place in said testimony:

"Q. Did you hear George Meyers say in the presence of yourself and Mrs. Meyers, Antone and Jake Saloum, your brother, that he was going to put up a job on Mike, and fix up some accounts in that book?"

[110]

"Judge GUNNISON.—We object to that as incompetent, irrelevant and immaterial, not the language of the witness, Jake Saloum, and as in no way an impeachment of the statement of Saloum."

"The COURT.—Oh, well, it may not be the exact, identical language, but it is the same in substance, as his testimony, so he may ask him if any such thing as that happened—answer the question."

To which defendant excepts and an exception was allowed.

And thereupon said witness testified further as follows:

I did not see anybody write in the book that night. He read it to Jake and he wrote it in English. I came to Douglas about 5 years ago, near May, 1910. George Maloof did not to my knowledge ever run a laundry in George Meyers store after I came here in 1910 up to the time that Mike and George dissolved partnership. George Meyers can read and write in his own language a little.

No cross-examination. [111]

**Testimony of Antone Meyers, for Plaintiff (In
Rebuttal).**

Whereupon to further prove her case plaintiff called in rebuttal the witness, ANTONE MEYERS, who being first duly sworn, testified as follows:

My name is Antone Meyers and I am a brother of George Meyers. I have been in this country for about 18 or 19 years and have been engaged in the mercantile business practically all of the time. I went back to the old country for a couple of years. I ran a store in Hoonah and Douglas and Juneau. I have been away for a number of years until about a year ago.

And thereupon the following proceedings took place:

“Q. Now, do you recall an occasion about a year ago when Jake Saloom came down to George Meyers’ store in Douglas, in the evening, and when you and Mrs. Meyers and George Meyers and Louis Saloom were there, and Jake Saloom, there was some talk about an account between George Meyers and Mike George, about some rent for his half of the store and the account of Mrs. Meyers’ board and so forth—that she had—do you remember that occasion when Louis and Jake were down there?” “A. Yes, sir.”

“Q. I will ask you, Antone, if at that time George Meyers took this book and wrote an account in it against Mike George?” “A. Why—

“Q. This book here (exhibiting Plaintiff’s Exhibit ‘A’ and ‘B’)—I will ask you what took place there?”

“The COURT.—If you want to rebut Jake Saloom by this witness, ask this witness whether, in his pres-

(Testimony of Antone Meyers.)

ence, at any time, any such thing as that happened.”

“Q. At any time, Antone, when you were present, and the parties I have mentioned were present, that is, George Meyers, Mrs. Meyers, Jake Saloum and Louis Saloum, did you hear [112] George Meyers say that he was going to put up a job on Mike George, and that he took that book and wrote down some accounts in it against Mike George?”

“A. Not that I know of.”

“Q. Do you remember when Jake Saloum was there on the occasion I have referred to, about a year ago, when you five people were there—do you remember George going out into the store and getting a book and bringing it in, and you or somebody else saying, ‘That is too new a book, better get an older book?’ ”

And thereupon said witness testified further as follows:

We were at the show on Sunday night and when we came out we saw Jake Saloum coming out and my brother, George Meyers, said no one of us could write English and Jake could write English—“I have a few words there between me and Mike and I like him to take off, “so we called Jake and took him down to our house, and he said all right. We come out, and we all walked right into my brother’s house. Of course, I was living there myself. Well, he asked Jake to write a few words for him, and he said all right, so George, he went back to the store, the little office, and got the book, and he told him to write it for him in English. Well, he says, all right,

(Testimony of Antone Meyers.)

so George, he was reading to him, and Jake, he was writing down on a sheet of paper—that is just as much as was done. I did not hear any conversation between George Meyers and Jake or Louis Saloum about putting up a job on Mike. I was there all of the time until they went out. Jack Saloum wrote it down as George read it to him from the book. George said he wanted to take it to an attorney.

No cross-examination.

[113]

**Testimony of Mrs. George Meyers, in Her Own
Behalf (Recalled).**

Whereupon, plaintiff in further proof of her case, called the witness Mrs. GEORGE MEYERS, the plaintiff, who being first duly sworn, testified as follows:

Direct Examination.

(Questions Propounded by Mr. CHENEY.)

That is my signature on the back of the check, my endorsement. I heard what Mike George testified here in the courtroom. I heard him tell that he loaned me fifty dollars, one hundred and fifty dollars and one hundred and seventy-five dollars, also about the two hundred dollars. I never borrowed \$50.00 from Mike George in the summer of 1912 nor at any time. I never borrowed \$150.00 from him in January of this year. I did not go to his store for about five minutes and tell Maloof that I wanted \$150.00, and then Mike gave it to Maloof and Maloof gave it to me. I never went to the store two or three days after this and asked for \$175.00. None of this story

(Testimony of Mrs. George Meyers.)

is true. I asked him for that \$200.00, and he say, "Go up to Hubbard's and we make a note; I give you \$200.00." I thought my husband will give me a little more to go down below to make operation, but my husband he didn't have money enough that time, to give me more than \$200.00; that is, we didn't have enough money to go down below, and I had an operation with Dr. De Vighne with that \$200.00; my husband give me that, and I got some money myself in the bank. I got the money on the check for \$200.00. My husband, he tell him, "For that we give you note, give you paper." When I asked Mike for the money he said he couldn't give the money without a note. I got the money and my husband gave him a note. At that time I asked Mike for the money he owed me and he said, "Yes, all right—you make operation now, and after you get better, we will see after that," and that is all. "That \$200.00 I borrowed to you, you are sick now, after while we will see; maybe I [114] pay you; I ain't got enough money now." I told my husband and we go to the office of Mr. Hubbard and Mr. Hubbard make the note and my husband sign it and my husband give the check to me, and I get the money myself. I heard Mike George testify that I did not ask him for the money, but I asked him for it. I heard Mike George swear that George Meyers came to his store and asked him for the \$200.00, and that he and Maloof and George Meyers went to Hubbard's and that I was not there. He was up to my house, and I say, "I am sick, can you give me \$200.00?" "I can-

(Testimony of Mrs. George Meyers.)

not give you \$200.00 without making a note first," and after the note was made Mr. Hubbard gave the check to me. I was going to Juneau; I must go to Treadwell and get my friend, Mrs. Ferrish, lived in Treadwell, to come to Juneau; all the time she come with me to the doctor, I go down to Treadwell and didn't find Mrs. Ferrish that time in the house, and I go to the Treadwell wharf to wait for the ferry, and I see Maloof, he wait for the ferry too; on the wharf in Treadwell, "Hello, Maloof, where you going?" "I go to Juneau looking for work; all the time I don't work." He said, "What are you going to do," and I told him I go to Juneau to see the doctor, and I went to Treadwell to take Mrs. Ferrish with me, but I didn't find her in the house, so go down to the Treadwell dock; and I got on the boat and I sat down and he sat down, Mr. Maloof, and after I sat down I put my hand in the pocket-book to pay my ferry fare, and no find it; my husband gave me \$150.00 to put in the bank; he said, "\$150.00, take that down and put the money in the bank." I put my hand in my pocket and I didn't find that \$150.00, and I told Maloof, "I think I lose my money"; and I told the conductor to stop the ferry, I got to go home. And in my home I find the money, and left it in the bed. I didn't go to Juneau that time, my husband [115] give me the \$150.00 to put in the bank, because I go to Juneau to see the doctor. I told the captain that I had lost the \$150.00 and he stopped at the Douglas wharf. I didn't tell him I had it done up in a handkerchief

(Testimony of Mrs. George Meyers.)

but might be that Maloof did. He said, "Where you put it?" and I say, "I put it in my pocket-book, in my pocket." I got off at Douglas and went right home and when I got inside I found the money home. I didn't go back to Juneau that time, because the bank was closed, I lost the time and I didn't go back that day. I generally put the money in the bank for my husband, and I helped him in the store sometimes.

And whereupon the following proceedings took place:

"Q. Now, Mrs. Meyers, you heard Mike George testify that after sleeping upstairs and eating with you upstairs over the store for three months, he said that was all he ever ate with you?"

"Judge GUNNISON.—That is objected to as not proper rebuttal."

"The COURT.—There has been no question yet, I cannot tell."

"Q. And you heard him say that after about three months he went down in the store and slept in the store on the counter?"

"Judge GUNNISON.—We object to that."

"A. Got that room, and Mike he stayed in it."

To which defendant excepts, and an exception was allowed.

And thereupon said witness testified further as follows:

That was Mike's bedroom and he always slept there [116] and never slept on the counter. My husband had the room all fixed up for him, nice new

(Testimony of Mrs. George Meyers.)

paper and everything, he also furnished the furniture. I took care of the room myself. Mike ate upstairs with us before the fire and after the fire he ate across the street with us. I did Mike's cooking, washing and fixed his room and charged him 50¢ a day or \$15.00 a month, that is what it is worth. He says, "Do that work and I pay you what it is worth." I have had some Indian woman wash dishes for me sometimes, got lots of clothes, and come to help me most of the time. I was in the room when Jake Saloum testified and heard what he said. The night that we were all in the store together, I go, me and my husband, to the show, and my husband's brother, we go the three together to the show—my husband's brother is Antone Meyers. After the show we see Louis Saloum and his brother Jake Saloum, outside, and my husband talk to him, and told him, "Jake, will you please come down home and write a few words in English, so I take it to Mr. Cheney and explain to him, "I cannot write it in English and cannot explain it in English." He say, "All right I go"; and so Jake Saloum, he come down and my husband read the book. "Can you do it?" He say, "All right, if you bring me a piece of paper"; he bring in this paper, and Jake Saloum put it in English, and my husband read it to him to bring to you. Jake Saloum copied the accounts in English on a piece of paper, these accounts were written previous to this time. He never said anything about fixing up a job on Mike George. The first time he bring the book nobody say nothing at

(Testimony of Mrs. George Meyers.)

all; he say, "Bring the book," and Jake Saloum put it in English, and my husband read it to him in my language. No one else wrote in the book but my husband, no one else can write. [117]

And thereupon the following proceedings took place:

"Q. Do you know whether Jake Saloum did bring that over to Juneau afterwards?"

"Judge GUNNISON.—I object to that."

"A. No, sir; he said we go together; together they go, Louis and Jake and my husband."

"Q. When George Meyers asked Jake Saloum to write this out at that time, what did he say he wanted it for?"

"Judge GUNNISON.—We object to that as incompetent, irrelevant and immaterial."

"The COURT.—It is simply asking the witness what was said and what was done on that occasion."

To which defendant excepts, and an exception was allowed.

"A. Because it is in my language and he make it in English to explain to you, because George cannot explain it to you in my language."

And thereupon said witness testified further as follows:

George Meyers stated that the reason he wanted it translated into English was so that he could give it to Mr. Cheney, his lawyer. I have lived in Douglas all the time and raised my family there. I never saw George Maloof running a laundry anywhere.

(Testimony of Mrs. George Meyers.)

And hereupon the following proceedings took place:

“Q. What has he (referring to witness Maloof) been doing the last two or three years?”

“Judge GUNNISON.—I object to that as incompetent, irrelevant and immaterial.”

“The COURT.—If she knows what he has been doing she may state.”

To which defendant excepts, and an exception was allowed. [118]

And thereupon said witness testified further as follows:

Sometimes George Maloof worked for his board, brought up things from the wharf, or worked in the store, or helped Mike George. He worked some of the time in the mines at Treadwell, but I don't know how long. He is working for Mike George now. At the time my husband and Mike finished partnership, Maloof was staying with Mike and eating with us, but I don't know where he slept. I know Mrs. Dutchy Martin. She never did any washing for Mike while he was staying at my house. At the time Mrs. Martin married she got sick and went to the Douglas Hospital. Sometimes Mrs. Martin came in the store to buy things and she and Mike had trouble over the price of them. After Mike's four children came from Pawtucket, Rhode Island, Mrs. Martin and the Indian woman did washing for him. That was after Mike George and George Meyers dissolved partnership.

(No cross-examination.) [119]

Plaintiff's Exhibit No. 6—Complaint in George vs. Meyers in Commissioner's Court.

Pltffs. Exhibit No. 6. Received in evidence Dec. 8, 1915. In cause No. 1277-A. J. W. Bell, Clerk.

In the United States Commissioner's Court for the District of Alaska, Division No. One, Juneau Precinct.

Case No. —.

MICHAEL GEORGE,

Plaintiff,

vs.

GEORGE MEYERS,

Defendant.

Comes now the above-named plaintiff, complaining of the defendant George Meyers, and for cause of action alleges:

I—That the plaintiff and defendant are both residents of Douglas City, Douglas Island, District of Alaska.

II—That on or about the 1st day of March, 1908, while the plaintiff was a resident of the State of Rhode Island, the plaintiff loaned to defendant the sum of Five Hundred (\$500) Dollars, which sum the defendant agreed to return to plaintiff with interest.

III—That on or about the 25th day of March, 1908, the plaintiff secured the payment of a bill of goods bought by defendant from Elias George & Brothers, for the amount of Three hundred sixty-four & 47/100 (\$364.47) Dollars;

IV—That thereafter and on or about the 10th day

of June, 1908, the plaintiff was compelled to pay to the said Elias George & Brothers, the sum of three hundred sixty-four & 47/100 (\$364.47) Dollars, the amount above referred to for the benefit of defendant.

V—That thereafter the plaintiff came to Douglas City, Alaska, and entered into partnership with defendant under the firm name of George Meyer & Co., on or about the 1st day of November, 1909, the plaintiff furnishing certain and defendant furnishing certain articles of stock, and it was then and there agreed that the plaintiff and defendant should be equal partners.

VI—That thereafter on or about the 21st day of December, 1911, plaintiff and defendant made a partial dissolution of said partnership, and it was then and there agreed that plaintiff [120] should give defendant in consideration for defendant's share in a certain stock of goods, wares and merchandise, credit upon the aforementioned loan and advancement, to the amount of Six hundred twenty-one 97/100 (\$621.97) dollars; it was further agreed that the amount due and owing plaintiff from defendant at that date was two hundred forty-two & 50/100 (\$242.50) dollars, with interest on Eight hundred sixty-four & 47/100 (\$864.47) dollars from the time at which the loan and advancements were made up to the time the plaintiff and defendant entered into the partnership above referred to, with interest on Five hundred (\$500.00) dollars during the existence of said partnership, the interest on Three hundred sixty-four & 47/100 (\$364.47) dol-

lars being considered as plaintiff's share of the rent due and owing to the defendant on account of the firm occupying the defendant's place of business, together with interest on two hundred forty-two & 50/100 (\$242.50) dollars from the time of said partial dissolution, and the above amount is now due and unpaid.

Wherefore, plaintiff prays judgment against the defendant in the amount of Two hundred forty-two & 50/100 (\$242.50) dollars with interest on said amount from and after the 21st day of December, 1911, interest on Eight hundred sixty-four & 94 (\$864.47) dollars at the legal rate from the 10th day of June, 1908, to the 1st day of November, 1909, interest on Five hundred (\$500) Dollars from and after the 1st day of November, 1909, at the legal rate of 8% up to the 21st day of December, 1911, together with his costs and disbursements in this behalf incurred.

(Signed) HELLENTHAL & HELLENTHAL,

Attorneys for Plaintiff. [121]

BE IT FURTHER REMEMBERED that thereafter and on the 9th day of December, 1915, said jury retired to deliberate upon their verdict, and that thereafter and on said day said jury returned into court the following verdict:

*“In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEO. MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

VERDICT.

We, the jury in the above-entitled cause find for the plaintiff, and assess the amount of her recovery at \$418.35.

(Signed) FRANKLIN W. BUTTERS,
Foreman.”

—which said verdict was thereupon received and filed in open court;

To which defendant excepts and exception allowed.

BE IT FURTHER REMEMBERED, that thereafter and within two days of said 9th day of December, 1915, to wit: on the 11th day of December, 1915, defendant duly and regularly filed with the clerk of the above-entitled court his motion for a new trial, accompanied by affidavits, as follows, to wit: [123]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Motion for New Trial.

Comes now the above-named defendant by his attorneys Messrs. Gunnison & Robertson, and respectfully moves the Court that the verdict heretofore rendered by the Jury herein may be set aside and a new trial granted, for the reasons and causes hereinafter set forth, all of which have materially affected the substantial rights of this defendant, against whom said verdict was rendered, to wit:

FIRST: Irregularity in the proceedings of the adverse party, and particularly her counsel, Z. R. Cheney, by which the defendant was prevented from having a fair trial, said irregularities consisting of the matters and things particularly set forth in the affidavits hereunto annexed, as well as appearing more fully in the shorthand notes of the official reporter in said cause;

SECOND: Misconduct of the prevailing party, and her counsel Z. R. Cheney, particularly in the matters and things set forth in the affidavits hereunto annexed and as more fully appears at large

in the record of the evidence of said case taken down by the official reporter therein. [124]

THIRD: Surprise that certain matters arising in the trial of said cause, which ordinary prudence could not have guarded against, as more particularly appears in the affidavits hereunto annexed and more fully appears at large in the records and files of said cause and in the shorthand notes of the evidence of the official reporter.

FOURTH: Newly discovered evidence material for this defendant, which he could not with reasonable diligence have discovered and produced at the trial, as more fully appears by the affidavits hereto annexed, and particularly the affidavit of one Messerschmidt.

FIFTH: (a) Insufficiency of the evidence to justify the verdict, as fully appears by the record of the evidence taken in shorthand by the official reporter in the whole of the said oral and documentary evidence adduced on the trial hereof, and particularly in the following respects: that the plaintiff failed to prove either of her alleged causes of action by a preponderance of the evidence, but that to the contrary the evidence of the witnesses on behalf of the defendant both in disinterestedness and weight, exceeded the evidence offered by the plaintiff; that the plaintiff on her first cause of action did not prove her case by preponderance of evidence, but to the contrary the evidence offered on her behalf was contradicted by at least three disinterested witnesses; that the plaintiff did not by a preponderance of the evidence establish her second cause of action as alleged in the complaint, but on the contrary there was no evidence offered conforming to the material allegations of the

complaint; that all the plaintiff's evidence went to show that if there ever was an account stated of a balance in favor of George Meyers, from the defendant, that said balance was \$345.00, and not \$390.00 [125] as stated in the complaint; that the defendant established by a preponderance of the evidence his counterclaim against the plaintiff at least for the sums of \$150.00 and \$175.00; that the loans of said sums were not proved by three witnesses, one of them the defendant, and that the only evidence in contradiction thereof was a general denial by the plaintiff; furthermore that there was corroborative testimony of said evidence of the defendant by the distinterested witness, Bothwell, whose testimony must have been entirely disregarded by the jury in order to arrive at their verdict; that said plaintiff offered no evidence that a reasonable value of the said alleged services for the defendant was \$390.00, except her own testimony that it was worth 50¢ a day, and that she was permitted to make said statement without having qualified as to being competent to testify to the reasonable value of said services;

(b) That the said verdict is against the law in all respects and particulars as more fully appears by the records and files in the trial of this case, and more particularly in the following respects to wit; that the plaintiff in one cause of action sued on account stated for \$390.00, whereas as a matter of fact her only evidence is to the effect that there is an account stated for \$345.00; that there is an account stated for \$345.00; that the said plaintiff in her reply admitted having borrowed \$200.00 from the defendant Michael George, but that there is no evidence in the case wherein said plaintiff ever states that she repaid said \$200.00; the only testimony in her behalf in that re-

spect going to the effect that her husband George Meyers, at one time paid back \$200.00 to the defendant; that said verdict is entirely against the law in that plaintiff in no wise proved her case by a preponderance of the evidence [126] and failed to establish that she was entitled to recover any sum from the defendant whatsoever;

SIXTH: Errors in law occurring during the trial and duly excepted to by the defendant, as more fully appears by the records and files herein and particularly in the shorthand notes of the official reporter, and more particularly in the following respects, to wit: Refusal of the Court to permit the defendant to request the witness George Meyers to read from the book, Plaintiff's Exhibit "A" which the said witness had stated he had written in his own handwriting; the swearing of the witness Louis Saloum as an interpreter over the objection of defendant's counsel; refusal of the Court to permit the defendant to cross-examine the witness George Meyers, in the plaintiff's case in chief as to the time that he and the defendant purchased the cabin from Mike O'Connor, and afterwards in the plaintiff's case on rebuttal permitting the plaintiff to go into said case with the witness George Meyers and the witness Leander Anderson; permitting the witness George Meyers to testify that there was a paper made out by one Hensen at the time of the settlement of the property; permitting the witness Louis Saloum, to testify as to the size of the store building; but afterwards refusing to permit the defendant to go into said matters; permitting the plaintiff's counsel to lead the various witnesses of the plaintiff over the objections of the defendant; refusal of the Court to permit the defendant to interrogate the witness, Louis Saloum

as to whether or not the witness George Meyers in a former case in the Commissioner's Court was not asked whether or not the defendant owed him any money; permitting the plaintiff to interrogate the defendant regarding the loss of the lives of the two children of the plaintiff; permitting [127] *per-*
mitting the plaintiff over the objection of the defendant to ask argumentative questions of the defendant; permitting the plaintiff to ask the defendant as to who got the money on the \$200.00 check; permitting the plaintiff to interrogate the witness George Maloof in regard to a case in which one S. T. Hills is plaintiff, and George Meyers and A. J. Meyers are defendants; permitting the plaintiff to interrogate the witness Maloof as to why the defendant passed the \$150.00 to him, why he, the defendant, did not pass the \$175.00 to him, what he had to do with the loan of \$200.00 from the defendant to the plaintiff's husband, where the witness Maloof slept; as to who was paying for his attendance in court, and as to whether or not the witness Maloof was running a gambling house; striking the answer of the defendant Fannie Williams, when she stated that the defendant Michael George put the money on the counter; permitting the plaintiff to cross-examine the witness Jake Saloom, relative to his having copied an account from the book, Plaintiff's Exhibit "A"; permitting the plaintiff's counsel on her case in rebuttal to state to the various witnesses one question involving matters which the defendant's witness Jake Saloom had testified to in such a manner that they could be answered by categorical answer; permitting the plaintiff to interrogate the witness Louis Saloom, with reference to the witness Jake Saloom having written

out in English the account set up in the book, Plaintiff's Exhibit "A"; permitting the plaintiff to testify regarding the witness Jake Saloum having written out a copy of the account in said book, Plaintiff's Exhibit "A"; permitting plaintiff's counsel to interrogate witness as to what took place in Cheney's office. [128]

And defendant herein specifically refers to all the objections and exceptions taken by him as more fully appear in the official report taken in shorthand by the court reporter in the trial of said cause.

This motion is based on the records and files herein, and the affidavit hereunto attached, and on the shorthand notes of the official court reporter of said trial, as well as on the exhibits that were received and offered in evidence.

(Signed) GUNNISON & ROBERTSON,
Attorneys for Defendant.

And thereupon and at the same time defendant duly filed his affidavit in support of his said motion for a new trial as follows:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Affidavit of R. E. Robertson in Support of Motion
for New Trial.**

United States of America,
Territory of Alaska,
Division Number One,—ss.

R. E. Robertson, being first duly sworn on oath, deposes and says: that he is one of the attorneys for the defendant in the above-entitled matter; that he prepared [129] said cause for trial and the pleadings herein and had the active charge of said case; that he used all reasonable and ordinary prudence in the preparation of said trial, but that he understook from the pleadings that the plaintiff was suing in a second cause of action on a stated account for \$390.00; that he was not prepared to meet the testimony offered by plaintiff that this stated account was \$345.00; and that said evidence constituted a variance between the pleadings which he could not guard against; that on the trial of said cause all the witnesses except Bothwell and Hubbard were Syrians, Indian or Italians; that all of these witnesses spoke very broken English; that the plaintiff's counsel in the trial of said cause time after time in interrogating defendant's witnesses, as well as the defendant, so formed his questions a though certain evidence had been given, whereas as a matter of fact there was no such evidence in the case, and that the defendant was thereby prejudiced in material matters; that in his argument the plaintiff's counsel, Z. R. Cheney, misstated the evidence, among other things, in that he said that the witness Mike George had stated that Mrs. Meyers was not present at the time of the \$200.00 loan to the witness George Meyers, and that

afterwards the defendant's witness Hubbard contradicted the defendant by saying that Mrs. Meyers was present; that in truth and in fact the record of the evidence shows that the witness Michael George stated that Mrs. Meyers was not present in his store when this loan was first spoken of; but that Mrs. Meyers was present at the time of the making of the check and the note in Mr. Hubbard's store; that the said counsel, Z. R. Cheney, likewise in his argument stated that the defendant had read over the complaint at [130] Douglas and had made up a fictitious counterclaim of \$375.00, whereas in truth and in fact there was no evidence that said counterclaim was fictitious, or that the defendant had ever read over said complaint at Douglas; that the said counsel Z. R. Cheney, likewise in his argument stated that the defendant, Michael George, was the foxiest of all Syrians on Douglas Island, whereas, in truth and in fact, there was no evidence in the record of such fact; that the said counsel Z. R. Cheney likewise said in his argument that the defendant had told one Hellenthal certain things set up in a paper, whereas, in truth and in fact there was no evidence to show that the said witness had ever told such facts to said Hellenthal; that all of said facts were prejudicial to the defendant in material matters and effected his substantial rights in the case; that since the trial of said action and the return of the jury's verdict, the defendant and this affiant found a witness, Gustave H. Messerschmidt, who will testify that on at least three or four occasions during the time that the defendant and the plaintiff's husband were in partnership, he, Messerschmidt, saw the defendant preparing, cooking and eating meals in the room in which said defendant was then residing off of the said store in

which said business was conducted; that said evidence is newly discovered, and that it is material for this defendant, and that neither the defendant nor his counsel with reasonable diligence could have discovered or produced the same at the trial; that this information was volunteered to the defendant after the return of the verdict, and that it was not until the defendant's mind was refreshed by said Messerschmidt that he recalled that said Messerschmidt could so testify.

Further deponent saith not. [131]

(Signed) R. E. ROBERTSON.

Subscribed and sworn to before me this 11th day of December, 1915.

[Seal] (Signed) ROSE A. STODDARD,

Notary Public in and for the Territory of Alaska.

My commission expires Feb. 25, 1918.

And thereupon and at said time defendant duly and regularly filed his motion for further time to file affidavits in support of said motion for a new trial as follows:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Motion for Further Time to File Affidavits in
Support of Motion for New Trial.**

Comes now the above-named defendant and re-

spectfully moves the Court that a further reasonable time be granted defendant to prepare and file affidavits in support of his motion for a new trial.

This motion is based on the records and files herein and on the affidavits which will be hereafter filed to be presented in support hereof, which said affidavits the defendant has not had time to prepare and file.

(Signed) GUNNISON & ROBERTSON,
Attorneys for Defendant. [132]

Thereafter on December 13th, 1915, defendant duly and regularly filed his motion requesting permission to file certain affidavits thereto attached, which said motion is as follows:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Motion of Defendant for Permission to File
Affidavit.**

Comes now the defendant and respectfully moves the Court for permission to file the hereto attached affidavits of Andro Martin, Gustave H. Messerschmidt, Julius A. Johnson and Royal A. Gunnison, in support of his motion for a new trial herein.

This motion is based upon the records and files of the above-entitled case and upon the affidavit of R. E. Robertson, hereunto attached, which said affidavit is

also made in support of said motion for further time.

(Signed) GUNNISON & ROBERTSON,
Attorneys for Defendant. [133]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Affidavit of R. E. Robertson, in Support of Motion
for New Trial.**

United States of America,
Territory of Alaska,
Division Number One,—ss.

R. E. Robertson, being first duly sworn on oath, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that heretofore on December 11th, 1915, he caused to be filed in this court in said action a motion for a new trial and a motion for further time to file affidavits in support of said motion for a new trial; that he served true and correct copies of both of said motions upon the plaintiff, by leaving said copies at the law offices of Cheney & Zeigler, attorneys for plaintiff, at about 6:00 o'clock P. M. of said December 11, 1915; that this affiant and his law partner were both actively engaged in the trial of said cause on the 7th, 8th and 9th days of December, 1915; that verdict was

brought in by the jury at about 9:30 P. M. on December 9, 1915; that the defendant resides at Douglas, Alaska, and that there was no opportunity for affiant or his said law partner to consult the defendant until the next day; that on Friday, December 10, 1915, affiant was obliged to attend a meeting of the creditors of the Alaska Lumber and Box Company, wherein he represented large claims, [134] and that he was unable to consult with the said defendant until the afternoon of that day; and that the defendant is a Syrian and speaks very broken English; that neither affiant nor his said law partner can speak the Syrian language; that after going into the matter with said defendant, affiant immediately gave an order to Mrs. L. A. Green, the official court reporter, requesting her to get out as quickly as possible the objections, exceptions and other portions of the transactions taking place at the trial of said cause; that he was unable to obtain said portion of the record until about 1:30 P. M., on December 11, 1915; that on the afternoon of December 10, 1915, affiant, after a consultation with said Messerschmidt, prepared the attached affidavit of said Gustave H. Messerschmidt; that on December 11, 1915, he used the utmost diligence to find said Messerschmidt, at his place of business and other places in the City of Juneau; but that he was unable to do so, and was therefore not able to get the signature of said Messerschmidt to the affidavit until this date; that affiant was unable to prepare the affidavit of Andro Martin until this date, by reason of the fact that said Andro Martin resides at the lower end of Douglas Island, and there was

no way of communicating with him until his coming to Douglas yesterday, December 12, 1915, and coming to Juneau to-day; that the testimony of both Andro Martin and Julius A. Johnson is newly discovered evidence, and that affiant was not able after due diligence to produce the same on the trial, because of the particular reason that his said client, the defendant, speaks very [135] broken English, and although this affiant to the utmost of his ability endeavored to go into the matter thoroughly in the preparation of trial, he had no opportunity to personally consult said Martin and Johnson until this date;

That affiant has hereinbefore stated that he filed a motion for a new trial, but that with all due diligence he was unable to file the same until about 5:00 o'clock on December 11, 1915, and that he was not able to prepare any affidavit except his own by that time; that he filed a motion for further time in which to file the affidavits in support of said motion for a new trial, but that he did not have time or opportunity to prepare affidavits at that time in support of said matter for further time; that at this time he makes this affidavit in support of his said motion for further time and presents the attached affidavits which since the filing of the aforementioned two motions, he has caused to be prepared and signed.

Further affiant saith not.

(Signed) R. E. ROBERTSON.

Subscribed and sworn to before me this 13th day of December, 1915.

[Seal] (Signed) ROSE A. STODDARD,
Notary Public in and for the Territory of Alaska.

My commission expires Feb. 25, 1918. [136]

And which said motion was on December 16, 1915, duly allowed by the Court and the affidavits of Andro Martin, Gustave H. Messerschmidt, Julius A. Johnson and Royal A. Gunnison were received and filed in support of said motion for a new trial as follows:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Affidavit of Julius A. Johnson in Support of Motion
for New Trial.**

United States of America,
Territory of Alaska,
Division Number One,—ss.

Julius A. Johnson, being first duly sworn, on oath deposes and says: That he resides at Douglas, Alaska; that he knows Michael George, Mrs. George Meyers, and George Meyers; that if he is called as a witness in the above-entitled case he will testify that he came to Douglas in July, 1910; that he is the hus-

band of Sarah Johnson; that he has known Michael George ever since he came to Douglas; that at said time George was living in a room off of the store where the partnership business of Meyers and George was conducted; that Meyers and his family lived across the sidewalk; that after he came to Douglas and during the time that Meyers and George were in partnership, he placed and built a concrete [137] chimney in the room off of said store, in which said Michael George was then living; that he was in said room on numerous occasions; that there was a small cooking range in said room; that he saw Michael George preparing, eating and cooking meals and food in said room on several occasions; that he saw during said period Michael George buying meat at the butcher shops; that on one occasion he purchased, at Michael George's request, meat for said Michael George; that affiant is a Scandinavian by birth; and a citizen of the United States; that his wife Sarah Johnson, did washing for Michael George for a period of something over two years, commencing about a week after their coming to Douglas in July 1910; that affiant on several occasions took clothes of Michael George away from his place of business during the time that he and George Meyers were in partnership to affiant's home for the purpose of his wife to wash them; further affiant saith not.

(Signed) JULIUS A. JOHNSON.

Subscribed and sworn to before me this 13 day of December, 1915.

[Seal] (Signed) R. E. ROBERTSON,
Notary Public in and for the Territory of Alaska.

My commission expires June 19, 1917. [138]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Affidavit of Royal A. Gunnison in Support of
Motion for New Trial.**

United States of America,
Territory of Alaska,
Division Number One,—ss.

Royal A. Gunnison, being first duly sworn on oath, deposes and says: That he is a member of the law firm of Gunnison & Robertson, composed of Ralph E. Robertson and himself; that said firm were the attorneys of record for Michael George the above-named defendant in the above-entitled cause, in the District Court, and conducted the trial of said case for the defendant in said court on the 7th, 8th and 9th of December, 1915.

Deponent further says that he was present during all of said trial and participated therein; that de-

ponent makes this affidavit in support of the motion for a new trial thereof, the jury in said cause having returned a verdict for plaintiff against the defendant; that the substantial rights of the defendant herein were materially and prejudicially affected and defendant was prevented from having a fair and impartial trial of his cause by reason of the irregularities and misconduct on account of the senior counsel for plaintiff, the adverse and prevailing party, and of the plaintiff and plaintiff's witnesses herein during the trial of this cause in this court.

Deponent further says that the irregularities and misconduct consisted, among other things, of a course of conduct on the part of said senior counsel for plaintiff which was carried out through the entire trial of the case as shown by the reporter's record, of stating to each of plaintiff's witnesses as the same came on the stand for the first time, what purported [139] to be the evidence of preceding witnesses in order to inform said witnesses for plaintiff who had been excluded from the courtroom under the rule of the court, what had transpired therein during the examination of other witnesses; that said senior counsel throughout the entire trial, particularly on the cross-examination of defendant's witnesses, made statements of what purported to be the testimony of these witnesses and others which were, as shown by the record in the case, not correct statements thereof the purpose of which was to mislead and confuse the said witnesses then undergoing examination; that all of the witnesses for defendant save two, spoke broken English and were unable to understand ex-

cept with great difficulty the questions propounded to them or to make themselves understood; that said acts of said senior counsel for the prevailing party were made over the objection of defendant's counsel and after the Court had repeatedly ruled thereon and directed said counsel for plaintiff to refrain from making statements of that kind; that these statements of counsel purporting to be the evidence in the case were not only misleading to witnesses, but had the effect of confusing them, and to confuse the evidence in the minds of the jury.

Deponent further says that this conduct as set forth continued throughout the entire trial as the same appears from the records of the case, but that deponent has not before him a copy of the records, consequently is unable to point out specific instances, but refers to the records in the case as taken by the stenographer in support thereof.

Deponent further says that the said senior counsel by questions and by statements made to witnesses in the presence and in the hearing of the jury referred to the death of two children of the plaintiff in a fire which occurred over the store in controversy; the said matter as to the death of the children was not material to any of the issues in the cause, but was highly prejudicial to the defendant in that it tended to, [140] and deponent verily believes, did arouse the sympathy of the jury with the plaintiff in the case to the extent that the jury failed to consider the evidence of the defendant and the defendant's witnesses in the case, or to give the defendant a fair and impartial trial, but returned a verdict for the

plaintiff which deponent verily believes to be against the evidence and the law in the case; that said plaintiff and the plaintiff's witnesses during the course of the trial, on the witness-stand continued to testify and counsel continued to propound questions after the counsel for defendant endeavored to interpose objections and after the Court had ruled thereon, and repeatedly continued to testify in answer to questions and to give testimony neither competent, material or relevant in the cause, after the Court had ruled thereon adversely to the plaintiff, the effect being that the statements of the witnesses were received by the jury regardless of the ruling of the Court therein.

(Signed) ROYAL A. GUNNISON.

Subscribed and sworn to before me this 13th day of December, 1915.

[Seal] (Signed) ROSE A. STODDARD,
Notary Public in and for the Territory of Alaska.

My commission expires Feb. 25, 1918.

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Affidavit of Gustav H. Messerschmidt in Support
of Motion for New Trial.**

United States of America,
Territory of Alaska,
Division Number One,—ss.

Gustav H. Messerschmidt, being first duly sworn on oath, deposes and says: that he is a citizen of the United States, and a resident of the territory of Alaska; that he is well acquainted with Michael George, Mrs. George Meyers and George Myers; and that he has known those persons for several [141] years; that if he is called as a witness in the above-entitled matter he will testify that he knew George Meyers and Michael George during the time they were in partnership at Douglas, Alaska; and that during said time, and while said Michael George was living in the room off of the store in which said partnership business was conducted by said Meyers and George, he on at least three or four occasions saw Michael George preparing, cooking and eating meals in the room in which said Michael George was then residing off of the said store. Further deponent saith not.

(Signed) G. H. MESSERSCHMIDT.

Subscribed and sworn to before me this 13th day
of December, 1915.

[Seal] (Signed) R. E. ROBERTSON,
Notary Public for Alaska.

My commission expires June 19, 1917.

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Affidavit of Andro Martin in Support of Motion for
New Trial.**

United States of America,
Territory of Alaska,
Division Number One,—ss.

Andro Martin, being first duly sworn on oath, deposes and says: that he resides on Douglas Island, Alaska; that he knows Michael George, Mrs. George Meyers and George Meyers; that if he is called as a witness in the above-entitled case he will testify that he is a Hungarian by birth, and a citizen of the United States of America; that he has known Michael George ever since the latter first came to Douglas, Alaska; and that he knew George Meyers and his wife prior to that time; that he traded at the store of Meyers and George when they were in partnership; that he knows that during a part of said time Michael George lived in a room off of the store in which said partnership business was conducted; that during said time and while Michael George and George Meyers were in [142] partnership affiant on several occasions saw Michael George coming out

of the said room and that he was engaged in the act of eating; that on at least one occasion during that said time he saw Michael George buying meat at a butcher-shop; that affiant's wife during said time and while Michael George and George Meyers were in partnership did washing for Michael George for some little time; that on at least two occasions during said time affiant carried the clothes of Michael George home to his affiant's wife so that the latter could wash them; that during a portion of the time that George Meyers and Michael George were in partnership George Meyers and his family lived in a building across the sidewalk from said store; that during said period of time, while said George and Meyers were in partnership and while said Meyers and his family lived in said building across the sidewalk, this affiant ate five or six meals with said Meyers in said building, and that Michael George was not present on any of said occasions; that affiant came to Douglas yesterday from his ranch at the end of Douglas Island and the last former occasion he was in Douglas was on Saturday, December 4, 1915. Further affiant saith not.

(Signed) ANDO MARTIN:

Subscribed and sworn to before me this 13 day of December, 1915.

[Seal] (Signed) R. E. ROBERTSON,
Notary Public in and for the Territory of Alaska.

My commission expires June 19, 1917. [143]

And thereafter and on the —— day of December, 1915, plaintiff filed her affidavit as follows:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

CAUSE NUMBER 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Affidavit of F. W. Butters et al.

F. W. Butters, Clark Smith, Carl E. Lund, W. R. Wills, John A. Sloan, J. H. Gilpatrick, Hugo Heidorn, J. T. Stephens, Martin Hansen, H. T. Tripp, Fred H. Smith, R. E. Davis, each being first duly sworn, on oath deposes and says:

I was a member of the trial jury which rendered a verdict in the cause of Mrs. George Meyers vs. Michael George, on the 10th day of December, 1915, for the sum of \$418.35, in favor of the plaintiff; that there were two causes of action the first being for the use of \$317.50 claimed to be due the plaintiff for services rendered defendant for 26 months and the second cause of action being for a claim for rent of the store building, which claim was assigned by George Meyers to the plaintiff; that after mature deliberation the jury agreed to entirely disallow the second cause of action for the rent, and also to disallow defendant's counterclaim for the sum of \$375.00 and to render a verdict for the plaintiff on her first cause of action for services only; that the verdict found by the jury upon the first cause of

action was for the sum of \$317.50, with interest from the 21st day of December, 1911 to the date of the verdict, at the [144] rate of 8% per annum; that the verdict so rendered was for the sum of \$418.35, which included \$317.50 together with interest of 8% per annum from the 21st day of December, 1911, to and including the date of the verdict.

(Signed) F. W. BUTTERS, Foreman; CLARK SMITH; CARL E. LUND; W. R. WILLS; JOHN A. SLOAN; J. H. GILPATRICK; HUGO HEIDORN; J. F. STEPHENS; MARTIN HANSEN; H. T. TRIPP; FRED H. SMITH; H. E. DAVIS.

Subscribed and sworn to before me this 20th day of December, 1915.

[Notarial Seal]

(Signed) A. H. ZIEGLER,
Notary Public for Alaska.

BE IT FURTHER REMEMBERED that thereafter and on the 3d day of January, 1916, argument having been had on said motion for a new trial, the Court rendered its opinion denying said motion, as follows:

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1277-A.

MRS. GEORGE MEYERS,

versus

MICHAEL GEORGE.

Order Re Filing of Opinion Denying Motion for New Trial.

The Court renders and files its opinion herein, denying the motion of defendant for a new trial. (Minute entry under date Monday, January 3, 1916, entered Court journal L, page 274.)

To which defendant excepts and exception allowed.

Order Approving, Settling and Allowing Bill of Exceptions.

The above and foregoing was duly presented to me, the Judge of the above-entitled court, on the 27th day of April, 1916, within the time allowed by law, the rules and practice and orders of this court, and the same having been examined by [145] counsel for the respective parties and by the Court,

NOW, THEREFORE, I, the Judge of the above-entitled court, before whom said cause was tried, do hereby approve, sign, settle and allow the same as a full, true and correct bill of exceptions herein, and do order the same, and the whole thereof, to be filed as and made a part of the record in this cause.

And I do further certify that said bill of exceptions contains all of the evidence, including all the exhibits introduced or offered at the trial and hearing of said cause, and on which the same was heard.

And I do further certify that said bill of exceptions contains true, full and correct copies of

(a) Defendant's motion to make plaintiff's complaint more definite and certain;

- (b) Defendant's demand for a bill of particulars;
 - (c) Plaintiff's bill of particulars;
 - (d) Defendant's motion to make plaintiff's bill of particulars more certain and definite;
 - (e) Order, under date of July 7, 1915, entered in Court Journal K, page 472;
 - (f) Verdict;
 - (g) Defendant's motion for new trial;
 - (h) Affidavit of R. E. Robertson in support of defendant's motion for new trial;
 - (i) Defendant's motion for further time to file affidavits in support of motion for new trial;
 - (j) Defendant's motion to file affidavits in support of motion for new trial;
 - (k) Affidavit of R. E. Robertson in support of motion for new trial and of motion to file affidavits in support of motion for new trial;
 - (l) Affidavits of Johnson, Gunnison, Messerschmidt and Martin in support of motion for new trial; [146]
 - (m) Affidavit of Butters, Wills, Heidorn, Tripp, Clark, Smith, Sloan, Stephens, Fred H. Smith, Lund, Gilpatrick, Hansen and Davis, filed by plaintiff in opposition to motion for new trial;
 - (n) Minute entry of oral opinion of court on January 3, 1916, denying motion for new trial;
- and that all of said proceedings and papers are made a part of the record herein.

Done at Juneau, Alaska, this 27th day of April, 1916, within the time allowed by law, the rules and

practice and the orders of this court.

ROBERT W. JENNINGS,
Judge of the District Court.

O. K. as to form.

Z. R. CHENEY.

Due service and receipt of a copy of the foregoing bill of exceptions is hereby admitted this 3d day of March, 1916.

A. H. ZIEGLER,
Of Counsel for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Apr. 27, 1916. J. W. Bell, Clerk.
By ————, Deputy.

[Endorsed]: No. 1277-A. In the District Court
for the District of Alaska, Division No. 1, at Juneau.
Mrs. George Meyers, Plaintiff-Defendant in Error,
vs. Michael George, Defendant-Plaintiff in Error.
Bill of Exceptions. Gunnison & Robertson, Attor-
neys for Michael George. [147]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

**Petition for Writ of Error and Order Allowing Writ
of Error.**

To the Honorable ROBERT W. JENNINGS, Judge
of the District Court for the District of Alaska,
Division Number One, Greeting:

Now comes the above-named defendant Michael George, by his attorneys, Gunnison & Robertson, and complains that in the records and proceedings had in said cause and by the verdict of the jury therein and also in the rendition of the judgment in the above-entitled cause in the District Court for the District of Alaska, Division Number One, against the said defendant on the 4th day of January, 1916, wherein it is ordered, adjudged and decreed that the above-named plaintiff have and recover from the above-named defendant the sum of \$418.35, with interest thereon at the rate of 8% per annum from December 9, 1915, together with her costs and disbursements, manifest error hath happened to great damage of said defendant, as will and does more fully appear from the assignments of error filed herewith,

WHEREFORE, the defendant prays for the allowance of a writ of error and for an order fixing the amount of bond for a supersedeas in said cause, and for such other orders and process as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit, and that upon the giving of such security all further proceedings in this court be suspended and stayed

until the determination [148] of said writ of error by said United States Circuit Court of Appeals.

And your petitioner will ever pray.

GUNNISON & ROBERTSON,
Attorneys for Defendant.

The above and foregoing petition for writ of error is hereby allowed, as prayed, and the bond is hereby fixed at One Thousand Dollars, to be approved by the clerk of the above-entitled court;

And it is further ordered that upon the said defendant's filing a good and sufficient bond herein in said sum, that all proceedings and execution herein be suspended and stayed pending the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit.

Done in open court at Juneau, Alaska, this 27th day of April, 1916.

ROBERT W. JENNINGS,
Judge of the District Court.

Entered Court Journal No. M, page 36.

Due service and copy of within Petition admitted this 27th day of April, 1916.

A. H. ZIEGLER,
Of Counsel for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Apr. 27, 1916. J. W. Bell, Clerk.
By ———, Deputy.

[Endorsed]: No. 1277-A. In the District Court for the Territory of Alaska, Division No. 1. Mrs. George Meyers, Plaintiff, vs. Michael George, De-

feudant. Gunnison & Robertson, Attorneys for Plaintiff, 101-105 Decker Building, Juneau, Alaska.

[149]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Assignment of Errors.

And now comes Michael George, the above-named defendant, and plaintiff in error, by his attorneys, Gunnison & Robertson, and makes and files this his assignment of errors;

1. The Court erred in making and entering that certain order herein, which order was made and entered on the 7th day of July, 1915, wherein and whereby the Court denied defendant's motion that the plaintiff make her complaint more definite and certain in those certain particulars set forth in defendant's said motion filed on June 15, 1915.

2. The Court erred in making and entering that certain order herein, which order was made and entered on the 7th day of July, 1915, wherein and whereby the Court denied defendant's motion that the plaintiff make her bill of particulars more definite and certain in those certain particulars set

forth in defendant's said motion filed on July 3, 1915.

3. The Court erred in refusing to permit the witness Mrs. George Meyers to answer the question propounded her by defendant's counsel as to how much she paid her husband, George Meyers, for the account for rent which her said husband had against said defendant.

4. The Court erred in refusing to permit the witness Mrs. George Meyers to answer the question propounded her by defendant's counsel, on cross-examination, as to whether or not her husband, George Meyers, had written down in the book, Plaintiff's [150] Exhibits "A" and "B," about the rent which said George Meyers claimed was due him from said defendant.

5. The Court erred in permitting and having the witness Louis Saloum sworn as interpreter of the testimony of the witness George Meyers.

6. The Court erred in permitting the witness Louis Saloum to interpret the testimony of the witness George Meyers.

7. The Court erred in permitting the witness Louis Saloum, while acting as interpreter, to testify as to the contents of the book, Plaintiff's Exhibits "A" and "B."

8. The Court erred in refusing to have the witness Jake Saloum sworn as an interpreter during the testimony of the witness George Meyers.

9. The Court erred in refusing to permit the witness George Meyers, in response to questions pro-

pounded him by defendant's counsel, to read the book, Plaintiff's Exhibit "B."

10. The Court erred in refusing to permit the witness George Meyers to answer the questions propounded him by defendant's counsel as to how much money the defendant had at the time that George Meyers and Michael George went into partnership together.

11. The Court erred in refusing to permit the witness George Meyers to answer the question propounded him by defendant's counsel as to the time that said witness George Meyers and the defendant Michael George bought a cabin from one O'Connor.

12. The Court erred in permitting the witness George Meyers, over defendant's objection, to answer the question propounded him by plaintiff's counsel as to whether or not there were any papers made out at the time that said witness George Meyers and the defendant Michael George went up to one Henson and settled about their property.

13. The Court erred in permitting the witness Louis Saloum, over defendant's objection, to answer the question propounded [151] him by plaintiff's counsel, requesting said witness to state the approximate size of the building in which the witness George Meyers and the defendant Michael George were doing business.

14. The Court erred in refusing to strike witness' answer and in permitting the witness Louis Saloum, over defendant's objection, to testify in response to questions propounded him by plaintiff's counsel as to what was said and done by the defend-

ant Michael George and the witness George Meyers at the time that said defendant and said witness were settling their partnership affairs.

15. The Court erred in permitting the witness Louis Saloum, over defendant's objection, to answer the questions propounded him by plaintiff's counsel as to what Michael George and the witness George Meyers did at the time that said defendant and said witness were settling their partnership affairs.

16. The Court erred in refusing and failing to strike the answer of the witness Louis Saloum, made in response to questions propounded by plaintiff's counsel, wherein said witness in referring to the witness George Meyers and the defendant Michael George stated: "They said some rent for Meyers and some work for Mrs. Meyers; they didn't settle everything there; they settled the goods and part of the property."

17. The Court erred in refusing to permit the witness Louis Saloum to testify, in response to questions propounded him by defendant's counsel, as to whether or not it was true that he did not hear all of the conversation which took place between the defendant Michael George and the witness George Meyers at the time of the settlement of their partnership affairs.

18. The Court erred in permitting the witness Louis Saloum, over defendant's objection, to answer the question propounded him by plaintiff's counsel as to whether or not he did not mean, referring to a conversation between defendant Michael

George and the witness George Meyers, that Michael George and [152] George Meyers agreed that defendant would pay afterwards certain rent to said witness Meyers.

19. The Court erred in refusing to permit the witness Louis Saloum to answer the question propounded him by defendant's counsel as to whether or not on a former occasion upon a trial in the Commissioner's court the witness George Meyers wasn't asked as to whether or not Mike George, defendant herein, owed him, George Meyers, any money.

20. The Court erred in refusing to permit the witness Michael George to testify in response to questions propounded him by his counsel as to the value and size of the building in which said defendant and the witness George Meyers conducted their partnership business.

21. The Court erred in permitting the witness Michael George, over defendant's objection, to answer the question propounded him by plaintiff's counsel as to whether or not the fact that two children of the plaintiff had been burned in a fire didn't make an impression on said witness' mind.

22. The Court erred in permitting the witness Michael George, over defendant's objection, to answer the question propounded him by plaintiff's counsel as to what person cashed the \$200.00 check, Defendant's Exhibit No. One.

23. The Court erred in permitting the witness Michael George, over defendant's objection, to answer the question propounded him by plaintiff's counsel as to whether or not said witness didn't

know at the time he made out the \$200.00 check. Defendant's Exhibit No. One, that the plaintiff went to the bank and got the money for said check.

24. The Court erred in permitting the witness Michael George, over defendant's objection, to answer the question propounded him by plaintiff's counsel requesting said witness to tell the jury why it was he loaned the plaintiff at one time \$50.00 and at another time \$175.00, and yet took a note when he loaned her \$200.00. [153]

25. The Court erred in permitting the witness Michael George, over defendant's objection, to answer the question propounded him by plaintiff's counsel, which said question is as follows: "I am not talking about that at all—do you want to answer the question fairly?"

26. The Court erred in permitting the witness George Maloof, over defendant's objection, to answer the question propounded him by plaintiff's counsel as to whether or not the defendant Michael George was interested in an action entitled "W. G. Hills against George Meyers."

27. The Court erred in permitting the plaintiff over defendant's objection, to interrogate the witness George Maloof as to who paid his expenses to Juneau from Anchorage.

28. The Court erred in permitting the plaintiff, over defendant's objection, to interrogate the witness George Maloof as to why the defendant Michael George handed him, Maloof, the \$175.00 which said defendant was loaning to the plaintiff.

29. The Court erred in permitting the witness

George Maloof, over defendant's objection, to answer the question propounded him by plaintiff's counsel as to his connection with the \$200.00 which the defendant loaned to the witness George Meyers.

30. The Court erred in permitting the witness George Maloof, over defendant's objection, to answer the question propounded him by plaintiff's counsel as to where said witness slept.

31. The Court erred in refusing to permit the witness George Maloof, upon questions propounded him by defendant's counsel, to explain what he meant when he said in response to questions of plaintiff's counsel that he had never talked to anyone about the case.

32. The Court erred in permitting the witness Jake Saloum, over defendant's objections, to answer questions propounded him by plaintiff's counsel as to whether or not the defendant Michael George did not set said witness up in business.
[154]

33. The Court erred in permitting the witness Jake Saloum, over defendant's objections, to answer the question propounded him by plaintiff's counsel as to whether or not said witness had not been able to get credit after the defendant had spoken to certain people in behalf of said witness.

34. The Court erred in permitting the witness Jake Saloum, over defendant's objections, to answer the question propounded him by plaintiff's counsel as to whether or not said witness protested against fixing up an account against the defendant in the book, Plaintiff's Exhibits "A" and "B."

35. The Court erred in refusing defendant's request to have plaintiff exhibit to the witness Jake Saloum a copy of the book, Plaintiff's Exhibits "A" and "B," which plaintiff's counsel contended had been made in the handwriting of said witness.

36. The Court erred in permitting the witness Jake Saloum, over defendant's objections, to testify in response to questions propounded by plaintiff's counsel as to whether or not said witness had ever heard anything about the account for rent which the witness George Meyers claimed against defendant.

37. The Court erred in permitting the witness Jake Saloum, over defendant's objections, to answer the question propounded him by plaintiff's counsel as to whether he didn't show to plaintiff's counsel in his office before the trial an account of the rent and claim for which plaintiff sued defendant herein.

38. The Court erred in permitting the witness L. Anderson, over defendant's objections, to answer the question propounded him by plaintiff's counsel as to whether or not said witness ever put an addition on the store building of the witness George Meyers.

39. The Court erred in permitting the witness George Meyers, over defendant's objections, on rebuttal, to answer the question propounded him by plaintiff's counsel as to whether or not the witness Jake Saloum did so as requested by said witness [155] Meyers and write out an account of the book, Plaintiff's Exhibits "A" and "B."

40. The Court erred in permitting the witness

George Meyers, over defendant's objections, on rebuttal, to answer the question propounded him by plaintiff's counsel as to whether or not certain things were said and done at the time of the making up of the account from the book, Plaintiff's Exhibits "A" and "B."

41. The Court erred in permitting the witness George Meyers, over defendant's objections, on rebuttal, to answer the question propounded him by plaintiff's counsel as to whether or not said witness had gone out in the store and got a book and brought it back and then went out and got another book in which to fix up the account against the defendant.

42. The Court erred in permitting the witness George Meyers, over defendant's objections, on rebuttal, to answer the question propounded him by plaintiff's counsel as to whether or not said witness Meyers would have known it if the witness Maloof had conducted a laundry in his store building.

43. The Court erred in permitting the witness Jake Saloum, over defendant's objections, on rebuttal, to answer the question propounded him by plaintiff's counsel as to whether or not he heard the witness Meyers say in the presence of said witness Saloum and the witnesses Mrs Meyers, Antone Meyers and Jake Saloum, that he, witness Meyers, was going to fix up an account in the book, Plaintiff's Exhibits "A" and "B," and put up a job on the defendant.

44. The Court erred in permitting the witness Mrs. George Meyers, over defendant's objections, on rebuttal, to answer the questions propounded her by

her counsel as to whether or not the defendant slept upstairs and ate with said witness for three months.
[156]

45. The Court erred in permitting the witness Mrs. George Meyers, over defendant's objections, on rebuttal, to answer question propounded her by plaintiff's counsel as to whether or not the defendant slept on a counter in the store in which said defendant and the witness George Meyers conducted their partnership affairs.

46. The Court erred in permitting the witness Mrs. George Meyers, over defendant's objections, on rebuttal, to answer question propounded her by her counsel as to what the witness George Meyers said at the time he asked the witness Jake Saloom to copy the account from the book, Plaintiff's Exhibits "A" and "B."

47. The Court erred in permitting the witness Mrs. George Meyers, over defendant's objections, on rebuttal, to answer question propounded her by her counsel as to what the witness Maloof had been doing for the last two or three years.

48. The Court erred in receiving and filing that certain verdict, wherein the jury returned a verdict in favor of the plaintiff and against the defendant, for \$418.35.

49. The Court erred in making and rendering that certain opinion and decision, which certain opinion and decision was made on the 3d day of January, 1916, wherein and whereby the Court denied the motion of defendant for a new trial herein.

50. The Court erred in making and rendering

that certain judgment, which certain judgment was made and entered on the 4th day of January, 1916, wherein and whereby it is ordered, adjudged and decreed that plaintiff have and recover from defendant the sum of \$418.35, with interest at 8% from December 9, 1915, together with her costs and disbursements.

Dated at Juneau, Alaska, March 2, 1916.

GUNNISON & ROBERTSON,

Attorneys for Defendant. [157]

Receipt of and due service of copy of within Assignment of Errors admitted this 27 day of April, 1916.

A. H. ZIEGLER,

Of Counsel for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Apr. 27, 1916. J. W. Bell, Clerk. By —————, Deputy.

[Endorsed]: No. 1277-A. In the District Court for the Territory of Alaska, Division No. 1. Mrs. George Meyers, Plaintiff, vs. Michael George, Defendant. Assignment of Errors. Gunnison & Robertson, Attorneys for Defendant, 101-105 Decker Building, Juneau, Alaska. [158]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, Michael George, as principal, and Emmet J. McKanna and Guy McNaughton, as sureties, are held and firmly bound unto Mrs. George Meyers, plaintiff above named, in the sum of One Thousand Dollars, to be paid to the said Mrs. George Meyers, her heirs, executors and administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, administrators executors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 27th day of April, 1916.

The condition of the above obligation is such that whereas the above-named defendant, Michael George, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court for the District of Alaska, Division Number One, rendered, entered and made by said last-mentioned Court on the 4th day of January, 1916, and wherein and whereby it is ordered, adjudged and decreed that the above-named plaintiff

have and recover from the above-named defendant the sum of \$418.35, with interest [159] thereon at the rate of 8% per annum from December 9, 1915, together with her costs and disbursements,

NOW, THEREFORE, the condition of this obligation is such that if the above-named Michael George shall prosecute his said writ of error to effect, and answer all costs and damages, if he shall fail to make good his plea, and shall at all times render himself amenable to the orders and process of this court or the appellate court, and render himself in execution if the judgment of this court is affirmed, on any judgment of this court, or said appellate court, or any court to which it may be appealed or removed by writ of error, then this obligation shall be void; otherwise to remain in full force and virtue.

M. GEORGE, (L. S.)

Principal.

EMMETT J. McKANNA, (L. S.)

GUY McNAUGHTON, (L. S.)

Sureties.

United States of America,

Territory of Alaska,—ss.

Emmett J. McKanna and Guy McNaughton, being first duly sworn on oath, each for himself and not one for the other, deposes and says: I am one of the sureties on the foregoing bond; I am a resident of the District of Alaska, but am not an attorney at law, counsellor, marshal, clerk of any court, or other officer of any court, and am qualified to be bail; and I am worth the sum of One Thousand Dollars, over and above all my just debts and liabilities and exclusive of property exempt from execution.

EMMETT J. McKANNA.

GUY McNAUGHTON.

Subscribed and sworn to before me this 27th day of April, 1916.

[Notarial Seal]

R. E. ROBERTSON,
Notary Public for Alaska.

My commission expires the 19 day of June, 1917.
[160]

The within bond is hereby approved this 27th day of April, 1916.

[Court Seal]

J. W. BELL,
Clerk of the District Court.

O. K.—Z. R. CHENEY.

Filed in the District Court, District of Alaska,
First Division. Apr. 27, 1916. J. W. Bell, Clerk.
By ————, Deputy.

[Endorsed]: No. 1277-A. In the District Court
for the Territory of Alaska, Division No. 1. Mrs.
George Meyers, Plaintiff, vs. Michael George, De-
fendant. Bond. Gunnison & Robertson, Attorneys
for Defendant. Gunnison & Robertson, Attorneys
at Law, 101-107 Decker Building, Juneau, Alaska.
[161]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America to
the Honorable ROBERT W. JENNINGS,
Judge of the District Court for the District of
Alaska, Division Number One, Greeting:

Because in the record and proceedings and by the verdict of the jury, as also in the rendition of the judgment of a plea in said District Court, before you, between Mrs. George Meyers, plaintiff, and Michael George, defendant, a manifest error hath happened, to the great prejudice and damage of the said defendant, Michael George, as is said and appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at the said place before said Court on the 27th day of May, 1916; that the record and proceedings aforesaid being inspected, the said Circuit Court of [162] Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLASS
WHITE, Chief Justice of the Supreme Court of the

United States, this 27th day of April, 1916.

[Seal]

J. W. BELL,

Clerk of the District Court for the District of
Alaska, Division Number One.

Said Writ is by me allowed, this 27th day of April,
1916.

ROBERT W. JENNINGS,

Judge of the District Court for the District of
Alaska, Division Number One.

Copy of this Writ of Error received and due service admitted this 27th day of April, 1916.

CHENEY and ZIEGLER,

Attorneys for Plaintiff and Defendant in Error.

[163]

Filed in the District Court, District of Alaska,
First Division. Apr. 27, 1916. J. W. Bell, Clerk.
By ———, Deputy. [164]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Citation on Writ of Error.

The President of the United States of America to
Mrs. George Meyers, the Above-named Plaintiff,
and to Her Attorneys, Messrs. Cheney & Zeigler,
Greeting:

You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court for the District of Alaska, Division Number One, wherein you, the said Mrs. George Meyers, are plaintiff and defendant in error, and Michael George is defendant and plaintiff in error, to show cause, if any there be, why the judgment in the said writ or error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 27th day of April, 1916, and of the Independence of the United States the 141st year.

ROBERT W. JENNINGS,
Judge of the District Court.

[Seal]

Attest: J. W. BELL,

Clerk of the District Court. [165]

Due service and receipt of copy of within citation admitted this 27th day of April, 1916.

A. H. ZIEGLER,
Of Counsel for Plaintiff and Defendant in Error.

Filed in the District Court, District of Alaska, First Division. Apr. 27, 1916. J. W. Bell, Clerk.
[166]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1277-A.

MRS. GEORGE MEYERS,

Plaintiff,

vs.

MICHAEL GEORGE,

Defendant.

Praecipe for Transcript of Record.

Hon. J. W. Bell, Clerk of the District Court for the
District of Alaska, Division Number One, at
Juneau.

Dear Sir: Please prepare the transcript of the
record on Writ of Error in the above-entitled case
and certify the following papers, to wit:

1. Complaint.
2. Answer.
3. Reply (filed on August 26, 1915).
4. Verdict.
5. Opinion filed, and order entered thereon, deny-
ing motion for new trial.
6. Judgment.
7. Bond for stay of execution.
8. Order of March 4, 1916, granting 30 days to
prepare and file bill of exceptions.
9. Order of March 28th, 1916, extending time to
April 10, 1916, in *in* which to prepare and file
bill of exceptions.
10. Order of April 10, 1916, extending time in which
to prepare and file bill of exceptions.

11. Order of April 17, 1916, extending time in which to prepare and file bill of exceptions.
12. Bill of exceptions, including order allowing and settling the same.
13. Petition for Writ of Error.
14. Order allowing Writ of Error.
15. Assignment of Errors. [167]
16. Bond.
17. Writ of Error.
18. Citation.
19. This Praecipe.

When so *prepare*, you will kindly transmit said record to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California.

GUNNISON & ROBERTSON,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division. May 13, 1916. J. W. Bell, Clerk.
By L. E. Spray, Deputy.

Due service of the within Praecipe admitted this 13th day of May, 1916.

A. H. ZIEGLER,
Of Attorneys for Plaintiff. [168]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

United States of America,
District of Alaska,
Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 168 pages of typewritten matter, numbered from 1 to 168, both inclusive, constitute a full, true, and complete copy, and the whole thereof, *of* as per the *praecipe* of the plaintiff in error, on file herein and made a part hereof, in the cause wherein Michael George is plaintiff in error and Mrs. George Meyers is defendant in error, No. 1277-A, as the same appears of record and on file in my office, and that the said record is by virtue of the Writ of Error and Citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination, and certificate, amounting to \$69.75 has been paid to me by counsel for plaintiff in error.

In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 27th day of May, 1916.

[Seal]

J. W. BELL,
Clerk.

By L. E. Spray,
Deputy.

[Endorsed]: No. 2805. United States Circuit Court of Appeals for the Ninth Circuit. Michael George, Plaintiff in Error, vs. Mrs. George Meyers, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed June 3, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In The
United States
Circuit Court of Appeals
For the Ninth Circuit

MICHAEL GEORGE,

Plaintiff in Error

VS.

MRS. GEORGE MYERS,

Defendant in Error

Brief of Plaintiff in Error

Upon Writ of Error to the United States District
Court for the District of Alaska,
Division No. 1

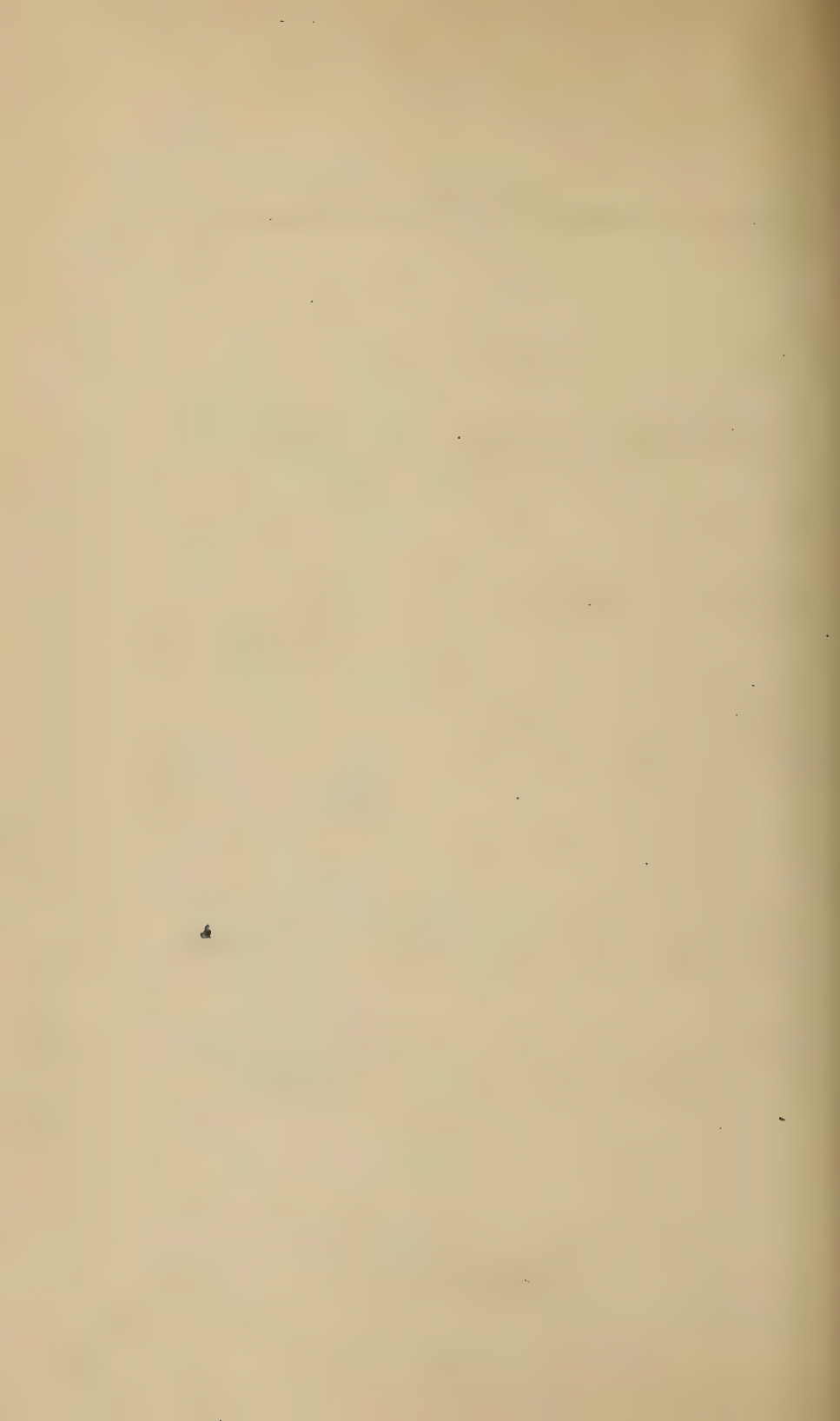
GUNNISON & ROBERTSON

Attorneys for Plaintiff in Error

Filed

BEATTIE, PRINTER, JUNEAU

F. D. Munckton,
Clerk.



No. 2805

In The
United States
Circuit Court of Appeals
For the Ninth Circuit

MICHAEL GEORGE,

Plaintiff in Error

VS.

MRS. GEORGE MYERS,

Defendant in Error

Brief of Plaintiff in Error

Upon Writ of Error to the United States District
Court for the District of Alaska,
Division No. 1

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STATEMENT OF THE CASE.

This is an action brought by plaintiff (defendant in error) against defendant (plaintiff in error) to recover on two causes of action.

As a first cause of action plaintiff alleges that between October 18, 1909, and December 21, 1911, she, at defendant's special instance and request, performed certain services for defendant; that defendant agreed to pay plaintiff a reasonable compensation for said services; that said services were reasonably worth \$390.00; that defendant has not paid any part of said sum except \$72.50; and plaintiff asks judgment for \$317.50, with interest at 8 per cent per annum from December 21, 1911.

As a second cause of action plaintiff alleges that on October 18, 1909, her husband, George Meyers, and defendant entered into a partnership agreement, whereby they agreed to conduct a general mercantile establishment in Douglas, Alaska; that said George Meyers was then the owner of a store suitable for said business, and agreed and stipulated with defendant to use said store for their partnership business; that in consideration thereof defendant agreed and promised to pay said Meyers, as defendant's portion of the rental of said building, the sum of \$15.00 on the 18th day of each month

during the continuation of said partnership business; that in pursuance to said agreement defendant occupied said building for twenty-six months, and that his share of said rental amounted to \$390;

that when said partnership was finally settled on December 21, 1911, it was agreed and ascertained by and between said Meyers and defendant that the latter's portion of said rental amounted to \$390.00, which amount defendant at said time promised and agreed to pay as his share of said rental; that ever since said date defendant has refused to pay said sum and has not paid any part thereof except \$45.00; that on May 7, 1915, said George Meyers, for good and valuable consideration, duly assigned, set over and transferred unto plaintiff the said account amounting to \$345.00, with interest at 8 per cent per annum from December 21, 1911, and that plaintiff is now the lawful owner and holder of said claim; and plaintiff asks judgment for said amount with interest as stated.

Defendant in his answer denies all the allegations contained in plaintiff's complaint, except he admits that he and plaintiff are both residents of Douglas, Alaska, and that he and George Meyers, plaintiff's husband, on or about November 1, 1909, entered into a partnership agreement whereby they agreed to conduct a general merchandise establishment in the town of Douglas, Alaska. As a separate and affirmative defense and counter claim defendant alleges that, at plaintiff's special in-

stance and request, in Douglas, Alaska, he advanced and loaned to plaintiff \$50.00 on or about July 15, 1912, \$150.00 on or about January 20, 1915, and \$175.00 on or about February 1, 1915, making a total of \$375.00, no part of which has been paid, and asks judgment for that sum against plaintiff with interest at 8 per cent per annum from March 1, 1915.

Plaintiff in her reply denies the affirmative defense and counter claim of defendant but says that defendant, at her request, loaned her \$200.00 on or about January 20, 1915, but that she repaid that sum to defendant on April 12, 1915.

A trial was on had on December 7, 1915, before the Court and a jury of twelve and thereafter, on December 9, 1915, the jury returned a verdict of \$418.35 for plaintiff and against defendant, on which, after motion for new trial being denied, judgment was entered for plaintiff on January 4, 1916.

The case is brought here on writ of error on account of erroneous rulings at the trial in the exclusion and admission of evidence, and in denying defendant's motion for a new trial and in refusing to set the verdict aside, and making and entering judgment thereon.

ERRORS DISCUSSED AND RELIED ON FOR REVERSAL.

THE THIRD ERROR assigned relates to the refusal to permit cross-examination of plaintiff, testifying in her own behalf, in regard to the assignment which she testified had been made to her by her husband (P. R. p. 32), and which she pleaded had been made for good and valuable consideration (P. R. p. 3, 4).

THE FOURTH ERROR assigned relates to the refusal to permit cross-examination of plaintiff, testifying in her own behalf, as to her husband's making an entry in plaintiff's exhibit "B" of the rent account which he claimed against defendant. Plaintiff testified in chief that she knew the book and that it had been written by her husband (P. R. p. 31), and that she knew about the agreement between her husband and defendant (P. R. p. 32).

THE NINTH ERROR assigned relates to the refusal to permit cross-examination of plaintiff's witness George Meyers relative to plaintiff's exhibit "B". The witness on direct examination stated that this exhibit was in his hand-writing and that he had made three entries in it relative to the rent account against defendant and the exhibit was marked for identification in connection with the testimony (P. R. p. 49).

THE EIGHTEENTH ERROR assigned relates to the admission of evidence through leading ques-

tion, over defendant's objection, by plaintiff's witness Louis Saloum. The question was exceedingly suggestive and leading on which ground defendant objected to it, and the witness answered it in practically the identical words used by the questioner. (P. R. p. 63.)

THE NINTH ERROR assigned relates to the refusal to permit cross-examination of plaintiff's witness Louis Saloum as to whether or not plaintiff's husband-assignor had been asked on a former occasion whether or not the defendant owed him any money. The witness had already testified relative to the alleged settlement between Meyers and defendant (P. R. p. 57, 58, 59, 60), giving the substance of conversations between, and statements made by, them, and had also testified relative to a former trial between the parties (P. R. p. 61, 63). The purpose of the question was clearly to lay a foundation for the putting of a further question, i. e.: in substance, as to whether plaintiff's husband on that former occasion had not stated that defendant did not owe him any money; and thus to elicit other statements, including statements against interest, made by witness Meyers, plaintiff's privy, as well as to elicit the whole of a general conversation, namely: the testimony in the former trial.

THE TWENTY-FIRST ERROR assigned relates to the admission of evidence, over defendant's objection, in the cross-examination of defendant, testifying in his own behalf, relative to the loss of

lives of plaintiff's two children, which prejudicial fact was not one of the issues and had nothing whatever to do with the merits of the case.

THE TWENTY-SIXTH ERROR assigned relates to the admission of evidence, over defendant's objection, in the cross-examination of defendant's witness Maloof relative to another action entitled "W. G. Hills v. George Meyers," which was an action entirely foreign to the case at bar, and to the irregularity occurring by plaintiff's counsel in persisting in asking questions relative thereto, although it was not one of the issues of the case nor material thereto, after the question had been excluded.

THE THIRTY-FIRST ERROR assigned relates to the exclusion of evidence in the refusal to permit defendant's witness Maloof, on redirect examination, to explain what he meant when he had said on cross-examination by plaintiff, that he had never talked with anyone about the case. An explanation was particularly necessary as the witness had both on direct and cross-examination admitted that he was very closely associated with the defendant.

THE THIRTY-FIFTH ERROR assigned relates to the refusal to exhibit on cross-examination to defendant's witness Jake Saloum a certain purported writing, which plaintiff contended was in the hand-writing of said witness, and concerning which at the time of the demand and thereafter

plaintiff was permitted to cross-examine the witness.

THE THIRTY-SIXTH ERROR assigned relates to the admission of evidence, over defendant's objections, in the cross-examination of defendant's witness Jake Saloum relative to having heard discussion between the parties concerning the rent account prior to the date of the occurrence concerning which the witness had testified in chief. The testimony of the witness on direct examination was confined solely to an impeachment of plaintiff's exhibits "A" and "B".

THE THIRTY-SEVENTH ERROR assigned relates to the admission of evidence, over defendant's objection, in the cross-examination of defendant's witness Jake Saloum relative to the contents of a certain purported writing which plaintiff contended witness had made but which, although a demand had been made for exhibition, was not exhibited to the witness.

THE FORTY-SIXTH ERROR assigned relates to the admission of evidence, over defendant's objection, in permitting plaintiff, on rebuttal, to testify on direct examination, as to hearsay statements made by her assignor George Meyers, at the time it was contended he asked defendant's witness Jake Saloum to make a copy of plaintiff's exhibits "A" and "B" and concerning which the defendant's witness Jake Saloum had been interro-

gated on cross-examination over defendant's objection.

THE FORTY-EIGHTH ERROR assigned relates to the receiving and filing of the verdict in the case.

THE FORTY-EIGHTH ERROR assigned relates to the making, rendering and entering of the opinion, decision, and order of the court denying defendant's motion for a new trial.

THE FIFTIETH ERROR assigned relates to the making, rendering and entering of the judgment in the case on January 4th, 1916, against defendant for \$418.35, with interest at 8 per cent from December 9, 1915.

ARGUMENT

THIRD, FOURTH AND NINTH ERRORS.

THE THIRD, FOURTH AND NINTH ASSIGNMENTS OF ERROR (P. R. p. 169, 170) are herein discussed together, as they all pertain to the exclusion of material and competent evidence, namely; the refusal to permit answers to questions propounded on cross-examination to witnesses testifying on behalf of plaintiff. However, each assignment is discussed specifically as to its particular error.

RIGHT TO CROSS-EXAMINE WITNESS OF ADVERSE PARTY:

The right of a party to cross-examine a witness called by an adversary is too thoroughly impressed on our juristic procedure to require authorities to sustain it — it being a right held in such high esteem by the common law that it has been said that “no evidence should be admitted but what was or might be under examination of both parties.”

10 M. A. L., 399.

This right is zealously guarded by the statute of Alaska:

“The adverse party may cross-examine

the witness as to any matter stated in his direct examination or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination."

Sec. 1498, C. L. A.

"A party has a right to cross-examine witnesses who have testified for the adverse party, or the adverse party himself when he testifies in his own behalf."

40 CYC 2473, 2474.

THIRD ERROR DISCUSSED SPECIFICALLY

Assignment of Error No. 3 (P. R. p. 169) relates to the refusal to permit the plaintiff, when testifying in her own behalf, to answer on cross-examination the following question:

"Q. How much did you pay your husband, Mrs. Meyers, for this account that he has got against Mike George?" (P. R. p. 36), to which question was interposed and sustained the following objection "Mr. Cheney: I object to that, if the court please, because they have raised no question about its being an assignment; it isn't necessary under the law that she pay him anything—* * *." (P. R. 36).

It can hardly be contended that the question was not cross-examination, i. e.: that the question did not bear on the matters testified to by the witness in her direct examination, as the witness stated on direct examination: "Mr. Meyers assigned over to me this account for rent in this case." (P. R. p. 32.)

GENERAL DENIAL PUTS ASSIGNMENT IN ISSUE.

Hence the objection must have been sustained on the theory that it was immaterial whether or not any consideration had been paid for the assignment. Conceding for the sake of argument, as stated by plaintiff's counsel (P. R. p. 36), it wasn't necessary for plaintiff to pay anything for the assignment, so as to have capacity to sue; yet the fact remains that plaintiff voluntarily had taken upon herself the burden of proving that she did pay something for it. She had sworn under oath (verification to complaint, P. R. p. 4) that her husband "for good and valuable consideration, did assign, set over and transfer unto" her this account. The defendant in this answer had denied these allegations (Answer, P. R. p. 6). It was thus one of the issues of the case.

"A general denial in an answer by the assignee puts the averment of the assignment of the contract in issue, and the as-

signee to recover must show a valid assignment."

Johnson v. Wickers, 120 N. W. 837,
838; 21 L. R. A. (N. S.) 359.

ASSIGNMENT MUST BE ALLEGED AND PROVED AS ALLEGED.

The pleading of the assignment by plaintiff, if she was to recover as an assignee, was not an unnecessary act; on the contrary it was a fact necessary not only for her to allege but also to prove.

"It is, of course, elementary that an assignee in certain cases must sue in his own name, yet it is necessary for him to allege in his declaration an assignment and to prove the same upon the trial to entitle him to recover."

McKnight v. Lowitz, 142 N. W. 769.

"The assignment was a fact at issue and the proof thereof as essential as that of the indebtedness."

Calloway v. Oro Mining Co., 89 Pac.
1070, 1071.

Ford v. Bushard, 48 Pac. 119, 120.

Brown v. Curtis, 60 Pac. 773, 774.

Reed v. Buffin, 21 Pac. 555, 556.

Bersch v. Sander, 37 Mo. 104, 106.

One of the elements of her pleaded assignment

was a good and valuable consideration (P. R. p. 3, 4.). If she failed to prove such consideration, she was neglecting to prove one of the elements on which her pleading said her first cause of action was based — her proof would be a variance to her pleading. It would have been a different assignment than the one spoken of in her complaint.

Suppose she had plead an assignment from a partnership and proved only an assignment from an individual, she would have been unable to recover. The assignment so proved would not be the assignment in issue.

Kibler v. Brown, 114 Fed. 1014.

Seeley v. Albrecht, 2 N. W. 667, 669.

CONSIDERATION OF ASSIGNMENT WHEN SET OUT MUST BE PROVED AND MUST BE SUFFICIENT.

However, it is begging the question to say plaintiff need not have alleged "good and valuable consideration"; she did plead it, and, having been placed in issue by the defendant, she necessarily must prove it as one of the issuable facts in the case.

Where the consideration for an assignment was set out, it must be proved and be sufficient."

Malone v. Adairville Bank, 6 Ky. L. 440.

(N. B.—The briefer did not have access to this last named case, but 5 C. J. 1010, Note 9 page 1011 says that the case so holds).

Calloway v. Oro Mining Company,
supra.

Brown v. Curtis, supra.

Reed v. Buffin, supra

Ford v. Bushard, supra.

The cases wherein it has been held that the consideration of the assignment was immaterial, are, upon examination, we opine, easily distinguishable from the case at bar. In cases so holding the defense has attempted to maintain that the assignee had no capacity to sue because there was no consideration for the assignment; hence, that the assignee could not recover; and the courts undoubtedly have rightly held that such a want of consideration did not militate against the assignee's capacity to sue. This, however, presents a case where the plaintiff has pleaded a certain kind of assignment, namely, an assignment which has as one of its elements a good and valuable consideration and that fact has been put in issue.

She will not be permitted to recover on an assignment, consisting of different elements than the one set up in her pleading, because in such event she would be recovering on a different set of facts than those which she had stated she was entitled to recover on.

CONSIDERATION IS AN ELEMENT OF ASSIGNMENT

We believe that light is shed on these two differentials when the fact is called to mind that an assignment does not differ in its essential elements from any other contract. There must be persons competent to contract, a valuable consideration, a legal subject matter, and mutual assent of the contracting parties.

Commercial Bank v. Rupe, 92 Fed. 789, 795.

Cross-examination on these elements would seem not only admissible, but material, and, in fact, indispensable. If the contract had been a sale or a conveyance, instead of an assignment, the witness could have been cross-examined as to the mode of making the sale, the consideration therefor, the person to whom the consideration was paid, the manner of payment, the contract under which the sale was made, actual ownership, and other matters pertinent to the transaction.

Classman v. C. R. I. & P. Ry. Co., 147 N. W. 757.

Renton v. Monnier, 19 Pac. (Cal.) 828. 40 CYC. 2498.

ASSIGNMENT MAY BE EXAMINED INTO AS TO PARTICULARITIES AND ELEMENTS

The consideration, good and valuable, of whatever it consisted was one of the constituent parts

of the assignment in issue. It would hardly be contended that the plaintiff on direct examination would have been confined to her answer "Mr. Meyers assigned over to me this account for rent in this case" (P. R. p. 32). She certainly could have stated when and where the transaction took place and the particulars of it.

Beezley v. Crossen, 17 Pac. (Ore) 577, 579.

Bank of La Grande v. Hunter, 57 Pac. (Ore) 424, 426.

CROSS-EXAMINATION MAY, THEREFORE, BE MADE AS TO CONSIDERATION OF ASSIGNMENT

"The assignment recited that it was made in consideration of 'one dollar and other good and valuable considerations.' It was therefore competent to show by parole what the other good and valuable considerations were."

Frame v. Attemeier, 133 N. W. 603, 604.

"Plaintiff sued as assignee of a claim against a firm in which the answering defendant was a special party. Defendant denied the assignment of the claim. The account on the firm books was in the name of the assignor 'in trust.' On cross-examination of such assignor, who had identified the instru-

ment of assignment, he was asked if he 'was in trust' and 'had the account in trust for someone?' Plaintiff's objection to the question was sustained. Held error, as the question bore directly on the question of the validity of the assignment."

Chambers v. Webster, 75 N. Y. S. 31;
61 App. Div. 546.

CROSS-EXAMINATION OF PARTY HIMSELF GIVEN WIDER RANGE THAN OF WIT- NESS NOT THE PARTY

And in any event, considerable latitude is allowed in the cross-examination of a party who testifies in his own behalf, and in such case the examination may take a wider range than would be permissible if the witness were not a party.

40 CYC. 2508, and cases cited.

PURPOSE OF QUESTION

The purpose of the question was clearly three-fold: (a) to draw out the circumstances and elements of the alleged assignment; (b) to test the memory and veracity of the witness; (c) and, if she answered contrary to her own pleading, to afford an opportunity to impeach her and impugn her credibility before the jury. All of which purposes were necessarily calculated to obtain an answer tending to either explain, modify, discredit

or disprove her statement on direct, and therefore the question was proper cross-examination.

“Any narration by a witness tending to explain, modify, discredit, or disprove his testimony in chief may be demanded of him on cross-examination.”

Furbeck v. Gevurtz, 72 Ore. 12; 142 Pac. 654, 656.

PREJUDICIAL EFFECT OF EXCLUSION OF EXAMINATION

The sustaining of the objection left no opportunity for the defendant to inquire into the assignment although it was one of the issues of the case, there being no further testimony by any of the plaintiff's witnesses in regard to it, except that of her husband, George Meyers, who when testifying on her behalf, made the significant statement on direct examination: “He (referring to defendant) still owes me the balance for the rent” (P. R. p. 50); disclosing the possible fact that plaintiff, if she had been permitted to answer, would have been obliged to contradict her sworn pleading, as it is highly improbable that she or any other person would pay a consideration for something from which she or he was to derive no benefit. If her husband's statement is true it would indicate that her pleading was false or else that she had done this very improbable thing. If she had so contradicted herself then she would have

been subject to impeachment under the provisions of the statute which provides:

“A witness may be impeached by the party against whom he was called, by a contradictory evidence, * * *”

Sec. 1501, C. L. A.; Sec. 669 Carter Code.

“A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony * * *.”

Sec. 1502, C. L. A.; Section 670, Carter Code.

“The credit of a witness may be impeached by proof that he has made statements out of court, concerning matters relevant to the issue, inconsistent with his testimony given at the trial.”

Smithson v. So. Pac. Co., 60 Pac. (Ore) 907, 912.

FOURTH ERROR DISCUSSED SPECIFICALLY

Assignment of Error No. 4 (P. R. p. 169) relates to the refusal to permit the plaintiff, when testifying in her own behalf, to answer on cross-examination the following question:

“Q. About the rent in there, did your husband write down in this book about the

rent too?" (P. R. p. 37), to which question was interposed and sustained the objection that it was not cross-examination. (P. R. p. 37.)

QUESTION BORE ON MATTERS TESTIFIED TO IN CHIEF

Page 3 of the identical book referred to in the question had been marked plaintiff's exhibit "A" for identification (P. R. p. 31) during plaintiff's direct examination and page 2 thereof was, in fact, later marked plaintiff's exhibit "B" for identification (P. R. p. 49), and was afterwards contended by plaintiff's witness George Meyers (P. R. p. 49) to constitute a statement of the rent account.

Plaintiff, in her own behalf, on direct examination had stated: "I would know the book; that is the book and he know it too; *that is the book I had my husband put it down in* when he paid * * * This book is in Mr. Meyers' writing * * * *I saw Mr. Meyers write it in the book.* * * *. This is the book, and he knows it too." (P. R. p. 31.)

She further testified on direct examination: "*I know about the agreement Mike George and George Meyers had about the rent for the store building that George Meyers owned; my husband tell me; both to pay \$30.00 a month; Mike George's half of that was half of \$30.00 a month. At the time he (referring to defendant) finished partner-*

ship with my husband he moved some goods, and he said: 'I am going to pay rent and make a new store; I ain't got much money to pay now; after while I pay you.' He talk like that to my husband three or four times; *he come to my house and he say*: 'Ain't got no money now; I am going to start and make a new store.' I don't think he paid nothing for the rent of the store. He said he would pay after while." (P. R. p. 32.)

This testimony presumably all related to the issues of the case, and the book entries were undoubtedly introduced by plaintiff for the purpose of strengthening her story. The book was not used by plaintiff as a memory refresher, but entirely to get an inanimate, white and black page corroboration.

Having thus testified relative to the book, having identified it, having stated that it was in her assignor's hand-writing, having testified she knew about the agreement between her husband and defendant, the question bore directly on matters relating to which she, the witness, had testified in chief.

QUESTION TENDED TO PRODUCE EXPLANATION AND MODIFICATION OF THE TESTIMONY IN CHIEF

The question was calculated to ascertain whether plaintiff really did know the book; whether her husband actually had written it, or any of it;

whether all the entries in the book had been made in her presence; what she knew about the alleged stated account.

EXPLANATION AND MODIFICATION OF TESTIMONY IN CHIEF IS LEGITI- MATE CROSS EXAMINATION

Defendant was entitled on cross-examination to propound such questions to the witness as would tend to explain, modify, discredit, or disprove her testimony in chief, and the question put was clearly intended to elicit such information.

Furbeck v. Gevurtz, supra.

BOOK PRODUCED AND IDENTIFIED BY WITNESS

The plaintiff and George Meyers, the writer of the book, were closely related in interest, standing in the relationship of wife and husband, assignee and assignor, party and witness. The entries, at least in part, were made at the instance of plaintiff as she says, referring to her first cause of action: "I got it marked on the book; I bring the money all the time and told my husband to mark it in the book; I cannot write myself, and he can't, so he told my husband to put it down. When he paid me *I had my husband put it down in the book in my language, Syriac.*" (P. R. p. 30, 31.) Having thus testified, as well as identifying the book the book (P. R. p. 31) and stating that she knew

about the agreement between Meyers and the defendant (P. R. p. 32), it would seem competent to cross-examine her on these facts in connection with the book. Moreover, the witness was the plaintiff herself, testifying in her own behalf, and a wider range of cross-examination was therefore permissible than under other circumstances.

40 CYC. 2508, *supra*, and cases cited.

IF BOOK PRODUCED AND IDENTIFIED BY WITNESS, LATTER MAY BE CROSS- EXAMINED CONCERNING SAME

It is a general rule that a witness may be cross-examined as to a writing which he has used to refresh his memory, or identified or concerning which he has testified on direct examination, although the paper was not introduced in evidence.

40 CYC. 2499, 2500, and cases cited.

NINTH ERROR DISCUSSED SPECIFICALLY

Assignment of Error No. 9 (P. R. p. 169) relates to the refusal to permit the witness George Meyers, on cross-examination, when testifying for the plaintiff, his wife, to answer the question requesting him to read plaintiff's exhibit "B" to the jury. The court refused to allow the question on the ground that it was incompetent, irrelevant and immaterial (P. R. p. 53.)

WITNESS ON DIRECT EXAMINATION HAD
TESTIFIED CONCERNING, HAD IDENTI-
FIED, AND HAD PROVED BOOK

The witness on direct examination had stated "*Mike paid me \$45.00 for rent and after that I had to wait as there was no money left. I entered that in the book at the time he paid me. I write it in the book * * *. I marked on the second page of the book when Mike paid me the \$45.00 for rent. I have had this book seven or eight years. (At this point page 2 of the book was marked plaintiff's exhibit "B" for identification.) The three entries on page 2 are \$15.00 each. Mike George never paid me only \$45.00 for rent.*" (P. R. p. 49)

It is therefore apparent that the trial court had inadvertently overlooked this testimony when it stated in sustaining the objection "all that he has told is simply that this man has identified that page; he simply says that it is his writing." (P. R. p. 53.

WHERE WITNESS USES BOOK TO REFRESH
MEMORY, OR IDENTIFIES IT OR TES-
TIFIES CONCERNING IT, OR PROVES
ENTRIES, WIDE RANGE OF CROSS-
EXAMINATION IS PER-
MISSIBLE

"A witness may be examined as to a writing which he has testified on his direct

examination, although the paper was not introduced in evidence."

40 CYC. 2499, *supra*, and cases cited.

"Where plaintiff becomes the witness to prove his book entries, in an action for goods sold, he can be cross-examined by defendant."

Clough v. Little, 3 Rich. Law 353.

The witness having based his testimony, if not his recollection, in a large measure upon the book, page 2, a very wide latitude should have been allowed to the defendant upon cross-examination in respect thereto.

State v. Shew, 57 Pac. (Kan) 137, 139.

Moreover the defendant had a right to cross-examine the witness upon page 2, as the witness had stated that he had marked on the identical page the amounts which the defendant had paid him; that he had written them; and that there were three entries on the page of \$15.00 each; and that the only amount which Mike George had paid him on the rent was \$45.00.

The sum of the three entries so referred to by the witness was \$45.00, the identical amount set out in plaintiff's complaint; and not only had the page been identified by the witness, but it had been marked for identification in the record in connection with his testimony (P. R. p. 49), and defendant therefore had the right to cross-examine in regard to it.

Brigham City v. Crawford, 57 Pac. 842, 843.

Kirchner v. Loughlin, 28 Pas. 505, 508.

“Where a witness is examined in his direct examination as to an affidavit made by him, he may be questioned on cross-examination as to whether he swore that its contents were true without a production of the document itself.”

Harris v. Terry, 98 N. C. 131; S. E. 745.

“A witness may be cross-examined as to items of a ledger which he has put in evidence.”

40 CYC. 2500, and cases cited.

Thayer v. Barney, 12 Minn. 502.

“Where a witness has testified for the plaintiff in reference to entries of measurements. (*In the case at bar payments of moneys*) (*Italics ours*) in his book, the defendant may cross-examine the witness in reference to those entries and the headings of the same for all purposes of the defense; the entire account, although composed of many items, is, in the eye of the law, but one memorandum and one entry, and the defendant is entitled to the whole of it.”

Green v. Caulk, 16 Md. 556.

The question was calculated to disclose that the entries did no corroborate the witness' oral testi-

mony and were not as he had contended, and that the entries were false. Hence, the question was permissible as it came within the general rule that any narration by a witness tending to explain, modify, discredit, or disprove his testimony in chief may be demanded of him on cross-examination.

Furbeck v. Gevurtz, spura.

Furthermore, a reading of the entries, if they were honest entries, could have in no wise injured plaintiff. But, if they were not as the witness contended, then what course could have been pursued better calculated to expose their falsity than the reading of them by the person who testified he had made them. (P. R. p. 49.)

EIGHTEENTH ERROR

The Eighteenth Assignment of Error (P. R. p. 171, 172) relates to the admission of evidence, i. e.: the permitting of plaintiff's witness Louis Saloum to answer on re-direct examination over defendant's objection that it was leading, the following question:

"Q. Now, what I want to get at, what do you mean by the word settling—do you mean they pay afterwards; was there anything more said about them settling?" (P. R. p. 63.)

STATUTORY DEFINITION OF LEADING QUESTION

The Alaska statute defines a leading question in the following terms:

“A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, unless merely formal or preliminary, except in the sound discretion of the court, under special circumstances, making it appear that the interests of justice require it.” Sec. 1496, C. L. A.

This is practically the same as the definition given by the text writers.

40 CYC. 2423 and cases cited.

1 *Greenl. Ev.* (16th Ed. 343.

Daly v. Melendy, 49 N. W. 926, 928.

LEADING QUESTIONS ARE IMPROPER

“It is a well settled general rule that leading questions are improper and should not be put to a witness. This rule applies in the examination of a party testifying in his own behalf as well as in the examination of any other witness, and is recognized and enforced in criminal, as well as in civil cases.”

40 CYC. 2422, 2423, and cases cited.

Busch v. Robinson, 81 Pac. 237, 238.

Nurnberger v. U. S., 156 Fed. 721,
732, et seq.

Hemrich v. Hemrich, 84 Pac. 327,
329.

QUESTION WAS NEITHER FORMAL NOR PRELIMINARY

An analysis of the question shows that it was not formal or preliminary; it went to the very gist of the contention that there was a stated account. An examination of the cross-examination (Ev. Louis Saloum, P. R. p. 60, 61, 62) discloses that there was no ambiguity which had arisen and which was necessary to explain away. The question was plainly purposed not only to elicit an explanation of ordinary words with well known and common meanings; namely: the witness' own statement on redirect examination "and Mike said 'you have got no money, and I have no money and we will settle that afterwards'" (P. R. p. 63), but what was even more serious it directly called for an affirmation that they, defendant and George Meyers, said they would pay and settled afterwards, which was of the very gist of the proof of the alleged stated account.

DISCRETION VESTED IN COURT TO PER- MIT LEADING QUESTIONS IS NOT AN ARBITRARY OR ABSOLUTE ONE

"The discretion vested in the court by reason of *Sec. 1496 C. L. A. supra* (Italics ours) is not an arbitrary or absolute one, and if on appeal it appears that leading questions were permitted over the objection on direct ex-

amination, under circumstances indicating a manifest abuse of such discretion the judgment will be reversed."

State v. Ogden, 65 Pac. (Ore) 449, 451.

SPECIAL CIRCUMSTANCES DID NOT EXIST
FOR A LEADING QUESTION, AND ITS
ALLOWANCE BY COURT WAS AN
ABUSE OF HIS DISCRETION

There was nothing disclosed in the record as to any special circumstances requiring a leading question; the witness had acted as interpreter at the trial (P. R. p. 45); he claimed that he had done the figuring for the witness George Meyers and the defendant in their alleged settlement (P. R. p. 60); his evidence as shown by the record discloses that he had good command of the English language (P. R. Ev. of Louis Saloum); and his intelligence, as well as the leading character of the question, is conclusively demonstrated by the fact that he answered it in almost the identical words of the counsel, namely, "A. They said they would pay it afterwards—settle it afterwards—fix it afterwards." (P. R. p. 63). It is therefore apparent that the court in the exercise of its discretion exceeded that sound discretion allowed it by the statute, and permitted the leading question on one of the most important elements of the stated account, namely: that the defendant had agreed to pay the amount. Plaintiff's witness Saloum was

called by plaintiff to prove this agreement. Without it, her case on the stated account would necessarily fall, as there was no creditable evidence of any presentation of the account to the defendant; and it was upon this point that was hinged that vital salient of the stated account, i. e.: defendant's agreement to it. This being so, we urge that it is ground for reversal.

State v. Ogden, supra.

NINETEENTH ERROR

The Nineteenth Assignment of Error (P. R. p. 172 (relates to the exclusion of evidence, i. e.: the refusal to permit plaintiff's witness Louis Saloum, to answer on re-cross-examination the following question:

"Q. Louis, in that case you were talking about a moment ago in the Commissioner's Court, wasn't George Meyers asked whether or not Mike George owed him any money" (P. R. p. 64) to which was interposed and sustained an objection that it was not competent. (P. R. p. 64.)

QUESTION TENDED TO ELICIT ADMISSION AGAINST INTEREST MADE BY PLAINTIFF'S PRIVY

The witness in his direct examination had stated the substance of alleged conversations between defendant and the plaintiff's assignor, George

Meyers, and that he had made figures for them and that they had said there was some money due Meyers for rent and due Mrs. Meyers for work, and that George Meyers and the defendant agreed that the defendant owed Meyers rent for two years and two months at \$15.00 a month, and that Meyers owed the defendant \$242.50. (Ev. of Louis Saloum, P. R. p. 57, 58, 59, 60.)

The question propounded was calculated to bring out an admission against interest made by George Meyers, plaintiff's assignor (P. R. p. 3), who, in his testimony had stated that the defendant still owed him for the rent. (P. R. p. 50).

QUESTION TENDED TO ELICIT ADMISSION
AGAINST INTEREST MADE BY PLAIN-
TIF'S PRIVY, AND, WAS, THERE-
FORE, COMPETENT

"Oral admissions of a party are competent evidence against him."

16 CYC. 942, and cases cited.

"Declarations of a person beneficially interested in result of litigation are admissible against the nominal party representing his interest."

16 CYC. 984, and cases cited.

"Statements of irrelevant facts made by persons identified in legal interest with the party to the record by reason of privity are competent evidence."

16 CYC. 985, and cases cited.

“In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment, * * *.” Sec. 858, C. L. A.

The question, answered in the affirmative, would have permitted the admission of a statement bearing directly on the issues of the case, namely: Whether or not the plaintiff's assignor had stated prior to the making of the alleged assignment that the defendant was indebted to him. The question should therefore have been allowed as it is the rule that a witness may be interrogated as to admissions against interest of the party for whom he has testified.

40 CYC. 2487, and cases cited.

Thomas v. C. & G. T. Ry. Co., 86 Mich. 496; 49 N. W. 547, 548.

Tiner v. State, 109 Ark. 139, 158 S. W. 1087.

QUESTION TENDED TO ELICIT REMAINDER OF CONVERSATION CONCERNING WHICH TESTIMONY HAD BEEN GIVEN ON REDIRECT

Furthermore the question related to what may be termed a general conversation, i. e., testimony in the prior suit (Ev. Louis Saloum, P. R. p. 61, 63), and the witness, in relating said general con-

versation, had said that "I don't say anything about the \$345.00 to any one," and that on the former occasion he had testified that *all that was owing between these parties was that George Meyers owed Mike George \$242.50* (P. R. p. 61.) He also stated on redirect examination, referring to the same conversation "He (referring to Mike George's counsel in the prior suit) asked me in regard to the \$252.50, but said nothing about the \$345.00" (P. R. p. 63), leaving a tacit, if not an express, implication that the reason nothing was said about the \$345.00 in the testimony in the prior suit was because it was an accepted fact at that time that the defendant did owe the witness George Myers that sum of money.

QUESTION TENDED TO ELICIT REMAINDER
OF CONVERSATION CONCERNING
WHICH TESTIMONY HAD BEEN
GIVEN ON REDIRECT EXAM-
INATION, AND WAS,
THEREFORE, COM-
PETENT

The witness having thus testified as to certain statements on a certain material matter of another person, namely, George Meyers, was subject to being interrogated as to other statements on the same matter of such person.

40 CYC. 2487, and cases cited.

"No rule is plainer than that a party

has the right upon cross-examination to have given all other parts of the same conversation, not given in the examination in chief, which will serve to explain or to modify the tendency of that part testified to in chief."

U. S. v. Knowlton, 3 Dak. 58, 13 N. W. 573.

People v. West, 146 Cal. 848, 849.

Gibbons v. Territory, 115 Pac. 129.

QUESTION WAS RELEVANT TO THE ISSUES, AND, THEREFORE WAS ADMISSIBLE

The question went to one of the very bones of contention, namely, whether or not the defendant owed the witness Meyers rent for two years and two months at \$15.00 a month, and it was therefore revelant. One part of the conversation having been given in redirect examination, the remainder was properly to be called out by re cross-examination.

Merrill v. Merrill, 187 Ill. App. 589.

St. Louis & S. F. Ry. Co. v. Cundieff,
171 Fed. 319.

Bruce v. Bevis, 56 Wash. 547; 106 Pac. 129.

But, of course, it could not be ascertained whether all of the conversation had been given until the question under discussion was put and answered. There could scarcely be conceived any

better evidence to disclose the real truth of the merits of plaintiff's second cause of action, than a statement made by her assignor that the defendant did not owe him any money under it.

TWENTY-FIRST ERROR

The Twenty-first Assignment of Error (P. R. p. 172) relates to the admission of prejudicial evidence over defendant's objection, i. e., the refusal to sustain defendant's objection to questions propounded on cross-examination as follows:

"Q. And at the time of that fire there were two of her children burned up? A. Yes, sir. Mr. Robertson.—We object to that as immaterial. Q. And that didn't make any impression on your mind so you can tell this jury when that happened—those two children, and lots of the goods that were in the building lost, and still you don't remember when that fire occurred? Mr. Robertson—We object to that as argumentative." (P. R. p. 70, 71.)

CROSS-EXAMINATION WAS ON COLLATERAL MATTERS, AND ITS EFFECT WAS PREJUDICIAL

The question "and at the time of the fire there were two of her children burned up?" was clearly not calculated to elicit any information as to the merits of the controversy. There was no issue in the case which required proof of the loss of the

lives of two of the plaintiff's children. However, having answered it, plaintiff insisted, over objection, on going further. The second question was directly calculated to intimate to the jury that the defendant was of such a mental disposition that even the loss of lives of children would make no impression on him—it was literally characterizing him as a base degenerate—a man bereft of all human sentiment. Yet the father of these very children stated on chief that the house burned in March, 1910, (Ev. George Meyers, P. R. p. 54) and on rebuttal that it burned on September 18, 1910 (Ev. George Meyers, P. R. p. 117). Was there anything then so strange in the statement, that, "I think the fire occurred the first part of 1910, but I did not have it marked down, * * *. I don't remember whether the fire occurred in 1909 or 1910," (Ev. Mike George P. R. p. 70) made by the defendant, when the father himself of the children first testified that it occurred in March, 1910. Was this lack of recollection on the defendant's part so pernicious as to justify the hurling at him on cross-examination of counsel's implied anathma: "And that didn't make any impression on your mind so you can tell this jury when that happened—those two children, and lots of goods that were in the building lost, and still you don't remember when that fire occurred?" (P. R. p. 71). The very fact that the trial court permitted the question over objection to be answered could only have

served to impress more strongly upon the jury the prejudicial fact that the defendant was such an execrable being that the fact, i. e., the loss of two children under most terrible circumstances, had slipped from his memory without an impression of its awfulness.

Who is there that can say that these questions with their answers did not sway the jurors in the rendition of their verdict? The plaintiff was a woman. It was her flesh and blood that had been so terribly destroyed by the holocaust. Was a lapse of five years so great, that the telling of the horrible tragedy may not have swayed the hearts of the individuals sitting in judgment as between plaintiff and defendant? What man has not had his sympathies moved by seeing of a play or the reading of a book? Here, were living actors before human jurors and the effect of the rehearsal was not diminished by the questions. The evidence for plaintiff cannot, even by herself, be contended to be overly strong in her favor—her story wavers, shakes, trembles. Did not these questions add the needed prejudice to throw the verdict to her? Who is there to say? The fact remains that these horrible extraneous matters were laid bare to the jury's gaze. And, the verdict was for the plaintiff.

It is apparent that the merits of the controversy in no wise involved the necessity of proof of the death of plaintiff's children. There can be no contention that such evidence enlightened the jury.

For what purpose then could the testimony have been elicited save to prejudice the jury by the information thus conveyed to them both in the questions and the answers.

CROSS-EXAMINATION WAS ON COLLATERAL MATTERS, AND ITS EFFECT WAS PREJUDICIAL. SUCH CROSS- EX-AMINATION IS NOT ADMISSIBLE

It is a general rule that cross-examination should not be extended to collateral, irrelevant or immaterial matters. While this rule is not applied with the same strictness in cross-examination as in direct examination, yet where the only effect of the cross-examination on collateral matters would be to prejudice the minds of the jurors it should not be permitted.

40 CYC. 2493, 2495, 2496, and cases cited.

State v. McCann, 43 Ore. 155; 72 Pac. 137, 138.

Crossen v. Grandy, 42 Ore. 282; 70 Pac. 906, 908.

Oldenberg v. Ore. Sugar Co., 39 Ore. 564, 65 Pac. 869, 870, 873.

Furbeck v. Gevurtz, 72 Ore. 12; 142 Pac. 654, 656.

Kittenback v. United States, 202 Fed. 377, 387.

Mines, etc. Co. v. Park etc. Co. 107
Fed. 881, 883, 884.

Allen v. United States, 115 Fed. 3, 11.

State v. Belknap, 87 Pac. 935.

Hurst v. Burnside, 8 Pac. 888, 889

Ansland v. Parker, 85 N. W. 192, 193.

Grace v. Anderson, 116 N. W. 116, 118.

Hancock v. Blackwell, 41 S. W. 205,
208

St. Jean v. Lippitt Wollen Co., 69 Atl.
604, 605.

Lesley v. Ewing, 90 Atl. 797.

Kane v. Transit, 93 Atl., 1001, 1003.

Frieman v. Paper Co., 139 N. W. 540,
544.

Wallen v. Wallen, 57 Pac. S. E. 596,
598.

In re Barney, 44 Atl. 75, 76.

TWENTY-SIXTH ERROR

The Twenty-sixth Assignment of Error (P. R. p. 173) relates to the admission of prejudicial evidence, i. e., the permitting the witness George Maloof, over defendant's objection that the question was immaterial, incompetent, irrelevant and not the best evidence, to answer on cross-examination questions relative to a suit designated as "W. G. Hills" against George Meyers.

(Ev. Maloof, P. R. p. 87, 88.)

CROSS-EXAMINATION WAS ON COL- LATERAL MATTERS

It can not be argued that the matters involved in the questions were either competent, relevant or material to the issues of the case at bar. This is fully disclosed by the want of anything in the record to connect them to the case at bar. There were only two possible purposes of the questions, i. e., either to obtain information as to another case not then on trial, or else to imply that the defendant and the witness were persecuting the plaintiff and her husband by other cases.

PREJUDICIAL INFORMATION WAS CON- VEYED TO THE JURY BY THE QUESTIONS

It is true that plaintiff was not permitted to go far into details, but there was no need as it is undoubtedly true that prejudicial information may be conveyed to the jury through questions as well as through answers, and in this case it was plainly given them by the questions.

Batchelder v. Manchester St. Ry., *infra*.

PERSISTENCE IN ASKING QUESTIONS WHICH HAVE BEEN EXCLUDED IS IMPROPER

The question was asked three times, each time over objection, and on the last occasion after it had been excluded.

“It is highly improper for counsel to persist in asking a question which has been excluded.”

38 CYC. 1478, and cases cited.

Batchelder v. Manchester St. Ry., 56 Atl. 752, 753.

Cleveland, etc. R. Co., v. Pritchman, 69 N. E. 663, 100 Am. St. Rep. 682, 687, & Note 2, p. 690.

Louisville & N. R. Co. v. Payne, 118 S. W. 353, 354.

Bergman v. Solomon, 136 S. W. 1010, 1011.

Shield Admr's v. Rowland, 151 S. W. 408, 410.

Dandel v. Wolf, 138 N. W. 814, 815.

Raefelt v. Koenig, 140 N. W. 56, 58.

PERSISTENCE IN ASKING QUESTIONS ON
COLLATERAL MATTERS, WHICH HAVE
BEEN EXCLUDED, IS GROUND
FOR REVERSAL

And the persistence in the attempt to introduce evidence, irrelevant, immaterial and foreign to the issue, after the court has denied the right to do so, is ground for reversal and new trial.

McClendon v. Bank, 174 S. W. 403, 405.

THIRTY-FIRST ERROR

The Thirty-first Assignment of Error (P. R.

p. 174) relates to the exclusion of evidence, namely: the refusal to permit the witness George Maloof, who was testifying on behalf of the defendant, on redirect examination to answer the following question:

“Q. Did you mean to tell Mr. Cheney you never talked about the case in that way?” to which was interposed and sustained the objection that it was suggestive. (P. R. p. 91.)

QUESTION WAS PURPOSED TO BRING OUT EXPLANATION OF AMBIGUOUS STATEMENT MADE ON CROSS- EXAMINATION

The question, as indicated by defendant's counsel (P. R. p. 91, 92), was clearly for the purpose of having the witness clear up in the minds of the jury his statement on cross-examination, namely; “I did not talk with Mike about the case before I came over.” (P. R. p. 71), which statement was calculated to discredit the witness inasmuch as he further testified on cross-examination “I have been a witness for Mike several times before in the Commissioner's Court (P. R. p. 87) * * *. I have been working in the store for Mike (P. R. p. 87) * * * In 1915 I worked in Mike's store (P. R. p. 90), * * * I lived in the big house with Mike” George (P. R. p. 90) and had also testified on direct examination (P. R. p. 85, 86, 87) that he had worked for, lived with and helped in the

store of, the defendant. These statements disclosed such a close intimacy between said witness Maloof and defendant, that without an explanation of it, his bald statement "I did not talk with Mike about this case before I came over" (P. R. p. 91) was sufficient in itself alone to convict the witness in the eye of the jury of falsifying. The exclusion of the answer therefore left the witness' statement unexplained—and from thenceforth his testimony must have been clothed in the eyes of the jury with a fabric of falsity to the prejudice of defendant.

LEADING QUESTIONS ARE PERMISSIBLE TO DRAW OUT EXPLANATION OF AM- BIGUOUS STATEMENTS MADE ON CROSS-EXAMINATION

The latter was entitled to have this false fabric removed by an answer to the question.

"The court ought always permit a witness to explain his testimony before leaving the stand."

Oberfelder v. Kavanaugh, 32 N. W.
295, 298.

"A witness who has given out an erroneous impression of the facts concerning which he has testified has a right, while still under examination, to make correction in the presence of the jury."

*Pac. Exp. Lumber Co. v. North Pac.
Lum. Co.*, 80 Pac. 105; 40 Ore. 194.

"It is not error to permit a witness to

make an explanation of statements made by him on the witness stand, or to permit him to correct any mistake he may have made in giving his testimony."

Tiffin v. Lewiston, 6 Ida. 231; 55 Pac. 545.

U. S. v. Randall, Fed. cas. 16118.

Hogan v. Reynolds, 8 Ala. 59.

Henry v. State, 19 So. 23.

Olferman v. Un. Dept. Ry. Co., 125 Mo. 408; 28 S. W. 742; 46 Am. State 483.

"A leading question may be put to ascertain the real meaning of a witness who has given an ambiguous answer or whose answer was obviously a lapsus linguae; and, where it is apparent that a witness has answered a question under a misapprehension as to its meaning, it is not error to allow him to be asked a leading question for the purpose of ascertaining what he in fact meant by his answer."

40 CYC. 2433, and cases cited.

"It is proper on re-examination to draw from the witness an explanation of his statements on cross-examination, or of matters brought out on cross examination. A witness may also be asked as to his reasons for his statements on cross-examination or at other times, or for acts or conduct on his part which

have been brought out, or interrogated as to circumstances tending to correct wrong impressions which might result from matters brought out on cross examination."

40 CYC. 2524, et seq., and cases cited.

THIRTY-FIFTH AND THIRTY-SEVENTH ERRORS

THE THIRTY-FIFTH AND THIRTY-SEVENTH ASSIGNMENTS OF ERROR (P. R. p. 175) are herein discussed together as both relate to cross-examination by plaintiff of defendant's witness Jake Saloum, over defendant's objection, relative to a purported writing, namely, a copy of plaintiff's exhibits "A" and "B", without an exhibition of the writing to the witness, although demand was made by defendant for its exhibition and production, and without an introduction of the writing in evidence.

Assignment of Error No. 35 relates to the refusal to require, after demand having been made therefor, the exhibition of the writing to the witness concerning which he was cross-examined:

"Q. As a matter of fact, Mr. Saloum, didn't you make a copy of that book yourself, of those items in that account, and show it to me there in the office? A. I don't remember that at all. Q. You would not dispute that? A. I cannot remember it. Q. You would not swear that you did not? A. No.

I cannot remember it. Mr. Robertson—If the Court please, if this man has a copy in this man's handwriting it is no more than right that he should exhibit it. The Court—It is not necessary that he do so." (P. R. p. 107.)

Assignment of Error No. 37 relates to the admission of evidence on cross-examination by plaintiff, over defendant's objection and after defendant's demand for exhibition to the witness of the writing referred to in the Thirty-Fifth Assignment of Error (P. R. p. 107), of defendant's witness Saloum, the record appearing as follows:

"Q. And didn't you at that time have a piece of paper—I think it was white paper with an account on it, and didn't you show that to me at the time—an account about the rent and the claim that Mrs. Meyers has now at this time against Mike? Judge Gunnison—We object to that as incompetent, irrelevant and immaterial; it is indefinite as to time, persons present, and there is no identification as to anything that was said about it." (P. R. p. 110).

WRITING SHOULD BE EXHIBITED TO WIT- NESS BEFORE HE IS CROSS- EXAMINED THEREON

It is a general rule that a witness cannot be cross-examined as to the contents of an instrument written or signed by him until it is exhibited to him,

or the contents thereof are read to him.

40 CYC. 2500, and cases cited.

“Where the cross-examination to impeach a witness relates to prior inconsistent statements made by the witness in writing the writing must first be shown the witness for identification, and, if he admits that he is the author of it, it must be read in evidence before he can be cross-examined as to its contents.”

10 M. A. L. 403.

This general rule is supported by statutory provisions in Alaska, to-wia:

“A witness is allowed to refresh his memory, respecting a fact, by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in writing. But in either case the writing must be produced, and may be inspected by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts; but such evidence shall be received with caution.” Sec. 1497, C. L. A.

“A witness may also be impeached by

evidence that he has made at other times statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present; and he shall be asked whether he has made such statements, and, if so, allowed to explain them. If the statements be in writing they shall be shown to the witness before any question is put to him concerning them." Sec. 1502, C. L. A.

There was no such writing in evidence at the time of the propounding of the questions embraced in these two assignments, nor was any such writing placed in evidence at any time during the trial, nor was any proof offered of its loss. It was therefore improper on cross-examination to ask the witness as to the contents of such writing, and, if the plaintiff desired to show the contents and cross-examine upon them, she should have exhibited the writing to the witness and introduced it in evidence.

O'Riley v. Clampet, 55 Minn. 539; 55 N. W. 740.

Morford v. Peck, 46 Conn. 380.

Insurance Co. v. Throop, 22 Mich. 146; 7 Am. Rep. 638.

Arnold v. Cheesebrough, 30 Fed. 145.

Calderon v. O'Donohue, 47 Fed. 39.

Richmond & D. R. Co. v. Jones, 9 So. 276.

Houser v. State, 93 Ind. 228.

McKnight v. U. S., 122 Fed. 926, 928.

Kirchner v. Laughlin, 28 Pac. 507, *supra*.

The witness stated when the prejudicial question was first propounded that he could not remember whether he had made a copy of the book, i. e., of the items in the account, and shown it to the plaintiff's counsel. There was no production of the writing although later the witness George Meyers, over objection (P. R. p. 121), the witness Antone Meyers (P. R. p. 128), and the plaintiff (P. R. p. 133), when testifying in behalf of plaintiff on rebuttal were all interrogated in reference to the same purported writing. If the writing did in fact exist and was made by the witness Jake Saloum it should have been exhibited to him before he was required to testify with reference to it.

Teller v. Ferguson, 51 Pac. 429, 432.

WITNESS CANNOT BE EXAMINED CONCERNING WRITING WHEN HE HAS NOT ADMITTED THE SAME

“If the witness *had denied or had not admitted* the part of the letter shown, he could not have been examined concerning the contents of the letter, nor could opposite counsel

in that case have been entitled to look at the paper."

Wright v. Bragg, 96 Fed. 729, 733.

QUESTIONS ERRONEOUSLY ASSUMED CON-
TENTS OF WRITING, WITHOUT WRIT-
ING HAVING BEEN EXHIBITED
TO WITNESS

Plaintiff's question in both instances represented and assumed the very contents of the writing, if it existed, namely, that the writing was a copy of the book which was already in evidence, with a statement of the items of the account therein.

"The rule that the witness' attention must first be called prevails in cross examining a witness as to the contents of a letter or other paper written by him; but it is here *applied in a peculiar and stringent form*. The counsel *will not be permitted to represent in the statement of a question, the contents of a letter*, and to ask the witness whether he wrote a letter to any such person with such contents, or contents to the like effect, *without having first shown to the witness the letter*, and having asked him whether he wrote that letter, and his admitting that he wrote it, for the contents of every written paper, according to the ordinary and well established rule of evidence are to be proved by the paper itself, and by

that alone, if it is in existence * * *. If the paper is lost * * * it would seem, that regularly the proof of the loss of the paper should first be offered, and that then the witness may be cross-examined as to its contents; after which he may be contradicted by secondary evidence of the contents of the paper. * * *. It follows, from what has just been said, that a witness cannot be asked on cross-examination, whether he has written such a thing, stating its particular nature or purport; *the proper course being to put the writing into his hands, and to ask him whether it is his writing.* * * *.”

1 *Greenl. Ev.* (16th Ed.) 463, 464.
465.

In this case this rule was directly violated. In each instance the witness stated that he did not remember having made such a writing, in which statements, without having had the writing in any wise exhibited, he was later contradicted by the witnesses of the plaintiff.

PREJUDICIAL EFFECT OF QUESTION

The prejudicial effect of the questions is readily seen. The witness was called by defendant (P. R. p. 103) to impeach the book, plaintiff's exhibits "A" and "B," which was offered to corroborate plaintiff's theory. By permitting plaintiff to cross-examine the witness on the contents of the alleged

writing, without exhibiting it, the witness was placed in a position where, no matter what his answer, it was probable that the jury would believe that at the time of the transaction to which he had been testifying, he had felt the book was an honest book of entries. This, of course, was further strengthened by later having plaintiff's witness contradict and impeach him as to the writing.

The cross-examination of such a witness certainly could be no more liberal than if he had been a witness called for a party and had been found to be adverse, and then the party calling him had desired to impeach him by evidence of statements made at other times inconsistent with his present testimony. But under such circumstances, before this could be done, the statements must have been related to him with the circumstances of time, place and persons present, or shown to him if in writing.

State v. Steeves, 43 Pac. (Ore) 947, 952.

Little v. Lishkoff, 98 Ala., 321; 12 So. 429.

THIRTY-SIXTH ERROR.

The Thirty-sixth Assignment of Error (P. R. p. 175) relates to the admission of evidence, over defendant's objection, on cross-examination by plaintiff of defendant's witness Jake Saloom, as follows:

“Q. Jake, so you heard about this account for rent for a considerable period before this transaction—I understand you had heard them discuss it before? A. About the account? Q. Yes. A. No, sir. Judge Gunnison:—That is not proper cross-examination. The witness: Not about the account, I heard about partnership. The Court—I think it is cross examination because it relates to the subject of the very entries that are in dispute.” (P. R. p. 108.)

CROSS-EXAMINATION WAS NOT CONFINED TO MATTERS BROUGHT OUT IN CHIEF

The witness in his direct examination (P. R. p. 103, 104) had confined his testimony entirely to an impeachment of plaintiff's exhibits “A” and “B.” There was not a scintilla of evidence in his direct examination to the effect that he had any knowledge whatsoever as to the controversy between the plaintiff or her husband and the defendant. The question propounded him was not calculated to explain, modify, rebut, impeach, or in any wise qualify his direct examination as to the making of the book, but was unquestionably purposed to place before the jury the very fact that the witnesses knew about the controversy itself and its inherent facts; thus, affording a peg upon which could be hung, in the juror's minds, an inference that the plaintiff's story was true because a year

before the trial the defendant's witness Saloum had heard it discussed.

CROSS-EXAMINATION SHOULD BE CONFINED TO MATTERS BROUGHT OUT IN CHIEF

"The general rule is that the cross-examination should be confined to matters which have been brought out on the direct examination."

40 CYC. 2501, and cases cited.

Hilderbrand v. United Artisans, 91 Pac. (Ore) 542, 544.

Cheneworth v. So. Pac. Co., 53 Ore. 111 99 Pac. 86, 91.

Morse v. O'Dell, 89 Pac. 139, 141; 49 Ore. 118.

Duntley v. Inman, 42 Ore. 334; 70 Pac. 529.

Simmons v. Ry. Co., 41 Ore. 151; 69 Pac. 1022, 1024.

Oldenbury v. Oregon Sugar Co., 39 Ore. 364; 65 Pac. 869, 871.

Sebreger v. Turner Flouring Mills Co. 43 Pac. (Ore). 719, 723;

State v. Savage, 60 Pac. (Ore) 610, 615.

"This rule is supported by the great preponderance of American authority."

10 M. A. L. 399.

“While the right to cross-examine a witness is a valuable one and should not be unnecessarily restricted, yet it must be limited to matters stated by the witness on his direct examination or be connected therewith.”

Goltra v. Penland, 45 Ore. 254; 77 Pac. 129, 131.

And while the adverse party may cross-examine the witness as to any matters stated in his direct examination, or connected therewith (Sec. 1498 C. L. A. *supra*), at the same time a party has no right to cross-examine a witness except as to facts or circumstances so stated on his direct examination, or connected therewith, and cannot cross examine the witness with regard to that which does not tend to impeach, rebut, explain, modify, or in some way qualify something he has testified to on his examination in chief.

Goltra v. Penland, *supra*.

“The general rule of practice in the Federal courts limiting cross-examination to the matters embraced in the examination in chief, subject to certain well known exceptions, is settled.”

Hales v. R. Co., 200 Fed. 533, 539 (C. C. A. 6th Cir.)

McKnight v. U. S., 122 Fed. 926, 928 (C. C. A. 6th Cir.)

Ill. Cen. R. Co. v. Nelson, 212 Fed. 69, 74.

The only exceptions are to show bias or prejudice or to lay a foundation to admit evidence of prior contradictory statements. It needs no argument to disclose that the question clearly was not conducive to show that the witness had any bias or prejudice, and, the want of anything in the record to show any prior contradictory statements shows it was not asked for that purpose.

Ill. Cent. Ry. Co. v. Nelson, supra

“Witnesses should not be cross-examined on the assumption that they have testified to facts touching which they have given no evidence.”

State v. Labuzan, 37 La. Ann. 49.

State v. Curran, 51 Io. 112; 49 N. W. 1006.

FORTY-SIXTH ERROR.

The Forty-sixth Assignment of Error (P. R. p. 177) relates to the admission of evidence, i. e., the refusal to sustain the objection interposed on the ground that it was incompetent, irrelevant and immaterial, to the question propounded the plaintiff, testifying in her own behalf, in direct examination on rebuttal, as follows:

“Q. When George Meyers asked Jake Saloum to write this out at that time, what did he say he wanted it for?” (P. R. p. 133.)

QUESTION ELICITED SELF-SERVING,
HEARSAY STATEMENTS

The question sought to elicit what George Meyers, plaintiff's assignor and husband (P. R. p. 2, 3), a witness in the case (P. R. p. 37, 117), had told the defendant's witness Jake Saloum (P. R. p. 103) who contended the book, plaintiff's exhibits "A" and "B", was false and dishonest (P. R. p. 103); and was directly calculated to bring out hearsay evidence. The witness Saloum had been on the stand previously, and could have been impeached upon proper foundation laid at that time. It is true that he was interrogated, over objection of defendant, which objections are discussed herein under Assignment of Error No. 35 and 37, as to a purported writing. However the record, (testimony of Jake Saloum) is bare of any foundation being laid for an impeaching question bearing on the same subject matter as the question now under discussion.

The witness answered "because it is in my language and he made it in English to explain to you (*referring to plaintiff's counsel who propounded the question*), because George cannot explain it to you in my language" and also made the further explanation that "George Meyers stated that the reason he wanted it translated into English was so that he could give it to Mr. Cheney, his lawyer." (P. R. p. 133.)

HEARSAY STATEMENTS ARE NOT LOGICAL PROOF

The answers produced by the question were permitted to go to the jury as illogical proof not only of the statement, but of the existence of the writing concerning which Jake Saloum had been interrogated, over objection, as discussed in said assignments of Error Nos. 35 and 37 herein.

“Prominent among logical inferences which the law of evidence rejects is that a fact exists because a person not called as a witness has stated its existence.”

16 CYC. 1192, and cases cited.

Haase v. O. R. & N. Co., 24 Pac. 238.

Donnelly v. U. S. 228 U. S. 243, 57 L. ed. 820, 833.

SELF-SERVING STATEMENTS ARE NOT ADMISSIBLE

Furthermore the answer sought to, and did elicit an answer directly in plaintiff's favor by the production of a self-favoring statement made by her privy, implying that before the suit was brought and at a time when, so far as the jury was advised, no suit was contemplated, the privy had made a certain statement which indicated that at that time he claimed to have a just claim against the defendant and wanted to submit it to an attorney for the purpose of bringing suit.

“It is a general rule of broad application that the declarations of a party in his own favor are not admissible in his behalf.”

Jones Comm. Ev. Vol. 1, 2., Sec 235a, 236, p. 352.

“A party’s own statements, oral or written, a fortiori, those distinctly self-serving, although the declarant was disinterested at the time of making his statements, are irrelevant when offered in favor of the declarant; and they are not rendered admissible by being part of a conversation or correspondence with the declarant’s witness, or with one sent by the opposite party, or with the adverse party or his agent, or by being brought to the attention of the other party or his agent and commented upon by him, or by being entered upon a book of account or other record, or brought out on cross-examination. * * * Such declarations are equally irrelevant when offered by the declarant’s representatives. The rule of exclusion also applies when such declarations are offered in evidence by third persons on their own behalf. A principal cannot offer the unsworn statement of an agent made in his favor.”

16 CYC. 1202, 1203, 1204, 1205, and cases cited.

Jones v. Curran, 11 Ore. 280; 3 Pac. 685.

Corbett v. Weaver, 109 Pac. (Wash.)
803.

Bollinger v. Wright, 76 Pac. (Cal.)
1109, 1110.

Oil Co. v. Newlove, 76 Pac. (Cal.) 543

FORTY-EIGHTH AND FORTY-NINTH ERRORS

The Forty-eighth and Forty-ninth Assignments of Error (P. R. p. 177) are herein discussed together, inasmuch as Error No. 48, relating to the receiving and filing of the verdict (P. R. p. 10), is inherently included within Error No. 49, relating to denial of motion for new trial, and can be discussed with it without repetition.

STATUTORY GROUNDS FOR NEW TRIAL

The Statute of Alaska provides that:

“The former verdict or other decision may be set aside and a new trial granted, on the motion of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party.

“First. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which such party was prevented from having a fair trial.

“Second. Misconduct of the jury or prevailing party;

“Third. Accident or surprise which ordinary prudence could not have guarded against;

“Fourth. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

“Fifth. Excessive damages, appearing to have been given under the influence of passion or prejudice;

“Sixth. Insufficiency of the evidence to justify the verdict or other decision, or that it is again law;

“Seventh. Error in law occurring at the trial and excepted to by the party making the application.” Sec. 1058, C. L. A.

VERDICT NOT SUPPORTED BY EVIDENCE

a. PLAINTIFF'S SECOND CAUSE OF ACTION

GENERAL RULE THAT FAILURE OR INSUFFICIENCY OF EVIDENCE IS GROUND FOR NEW TRIAL

“It is ground for a new trial that there was a total failure of evidence to support the verdict or a failure of evidence as to some material facts necessary to support the verdict, or that the evidence received to prove a fact

essential to support the verdict was insufficient in law."

29 CYC. 832, 833, and cases cited.

Clinch v. Canova, 15 So. 427, 429.

O. & M. R. Co. v. McDanel, 31 N. E. 836.

Brown v. Hickie, 27 N. W. 276, 278.

Schrader v. Hoover, 54 N. W. 463, 464.

Gano v. Prindle, 50 Pac. 110, 112.

Wendt v. Reimer, 58 Pac. 1003, 1004.

Pecos etc. R. Co. v. Welshimer, 170 S. W. 263, 265.

Prinz v. Western Un. Tel. Co. 105 Pac. 449, 451.

Cunningham v. Warren Bros., 94 Atl. 427.

EVIDENCE DISCLOSES TOTAL FAILURE OF PROOF TO SUPPORT PLAINTIFF'S SECOND CAUSE OF ACTION

Applying this measure, which we think must be conceded to be a correct rule of law, to the record, it readily discloses that plaintiff's proof does not measure up to the verdict.

The plaintiff in her second cause of action alleged that on December 21, 1911, it was agreed and ascertained by and between George Meyers and defendant, that defendant's portion of the rental for said building amounted to the sum of \$390.00; and that defendant at said time promised and

agreed to pay said amount as his share of the rental of said store (P. R. p. 3.)

Plaintiff's theory was that she had thus pleaded a stated account. This is indicated by the court's statement: "He is suing for an agreed sum." (P. R. p. 55). However, the testimony on behalf of plaintiff as to any stated account consists of the plaintiff's own statement that the defendant promised to pay her husband the rent, but she did not mention in what amount (P. R. p. 32); and her husband, George Meyers' testimony that "I received the rent for two or three months from him but after that the store did not pay very well. * * * Mike agreed to pay \$15.00 a month for his share of the store building. Mike paid me \$45.00 for rent and after that I had to wait as there was no money left. I entered that in the book at the time he paid me. I write it in the book. * * * I marked on the second page of the book when Mike paid me the \$45.00 for rent. I have had this book (referring to plaintiff's exhibit "A" and "B") seven or eight years. The three entries on page 2 (exhibit "B") are \$15.00 each. Mike had never paid me only \$45.00 for rent." (P. R. p. 49), and that "We dissolved partnership on December 21, 1911, and at that time Mike owed me \$345.00 * * *. On December 21, 1911 all bills and accounts and all differences were settled between Mike and myself and were all paid, but the money was not settled. I have money still coming to me

for rent, board and work; he had \$242.50 coming to him for this business" (P. R. p. 51); and the testimony of the witness Louis Saloum who testified that "they agreed that Mike owed rent for two years and two months at \$15.00 a month, and that George owed Mike \$242.50" (P. R. p. 59). These extracts from the testimony of the plaintiff's witnesses conclusively show that there never could have been a stated account for \$390.00 as alleged in her complaint. According to one version of the witness George Meyers (P. R. p. 49) the stated account was \$345.00. According to another version of the witness George Meyers (P. R. p. 51) the stated account was the difference between \$345.00 and \$242.50, or \$102.50. According to the version of the witness Louis Saloum, the stated account was the difference between \$390.00, (two years and two months at \$15.00 a month) and \$242.50, or \$147.50. (P. R. p. 59.) This being so, by what stretch of the imagination can it be asserted that she proved her claim against the defendant for \$390.00. Certainly, neither \$345.00, nor \$147.50 nor \$102.50 is the amount which she claimed in her pleading. A stated account isn't a shifting, wavering, doubtful balance. On the contrary it is a certain amount, *a definite balance*.

"An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions. * * *.

“In general terms, where an account is rendered by one person to another, showing a balance due from the one to the other, and the indebtedness thus expressed is acknowledged to be due by the persons against whom the balance appears, or where parties having previous transactions agree upon a definite balance as due from one to the other, this will constitute an account stated.”

1 CYC. 364, and cases cited.

“ * * *, to constitute an account stated it must appear that the plaintiff and defendant accounted together in their mutual demands, or of the demands of the plaintiff against the defendant, and upon the account there was found due to the plaintiff from the defendant the amount claimed.”

Truman v. Owen, 21 Pac. (Ore.) 655
667.

Plaintiff's proof plainly doesn't accord with her pleading. Suppose instead of a stated account her allegation had been that defendant made a note payable to the order of her husband. Proof of a note made to the order of blank would not have supported her allegation. Yet the note would be there. So, in this case the stated account is not one which supports the pleadings.

Thompson v. Rathbun, 22 Pac. 837,
838.

As said by the court in *Ahern v. Oregon Tele-*

phone & Telegraph Company, 30 Pac. (Ore.) 403, the code with all its comprehensive liberality will not admit a plaintiff to sue for a horse and recover a cow.

No more so does her proof support her allegation in the case at bar.

The defendant had put in issue all the material allegations of her pleading. Hence, the burden was on plaintiff to prove those allegations as alleged.

"The defendant (*P. R. p. 5*) denied his assent to the statement of account alleged in the complaint, and the burden was therefore on the plaintiff to prove all of the material allegations of the account stated as alleged."

First. Nat'l. Bank v. Peck, 103 N. E. 643.

This burden she met in her proof not by proving the amount claimed in her pleading i. e.; \$390.00, but by offering a selection of three sums, namely, either \$345.00, \$102.50, or \$147.50, depending upon the version chosen from the testimony of the witnesses. And she is therefore clearly not entitled to recover on her second cause of action.

"Where an action is brought upon the account as stated, the stating of the account must be proved as alleged, and there can be no recovery on a quantum meruit unless the pleadings are appropriately amended."

Mattingly v. Shortell, 85 S. W. 215.

"The plaintiff's evidence showed a different amount due from that which she pleaded, and she therefore could not recover on the account stated."

Barker Auto Co. v. Bennett, 106 N. E. 990, 991.

"The cause of action (in a stated account) must be proved as alleged, and if not so proved there will be a variance unless the pleadings are amended."

1 R. C. L. 221, Par. 21.

"Where there is a failure of proof, a new trial must be ordered."

29 CYC. 763, citing *Ryan v. Copes*, 11 Rich. (S. C.) 217; 73 Am. Dec. 160; *Thornton v. Road Co.*, 24 U. C. Q. B. 335.

The provisions of the Alaska Statute relative to failure of proof are as follows.

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, the fact shall be proved to the satisfaction of the court, and in what respect he

has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just." Sec. 919, C. L. A.

"When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." Sec. 920, C. L. A.

"When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof." Sec. 921, C. L. A.

Plaintiff failed to prove her allegation of a stated account in its entire scope and meaning; because as stated she failed to prove the very gist of the stated account, namely, the definite balance; and we therefore believe it must be conceded that there was a failure of proof as to her second cause of action.

Stokes v. Brown, 26 Pac. 561, 562.

Ahern v. Ore. Tel. & Telg. Co., supra.

Thompson v. Rathbun, supra.

Pearce v. Buell, 29 Pac. 78.

Kincaid v. O. S. L. R. Co., 29 Pac. 3.

b. PLAINTIFF'S FIRST CAUSE OF ACTION
 GENERAL RULE THAT VERDICT CONTRARY
 TO OR AGAINST WEIGHT OF EVIDENCE IS GROUND FOR NEW
 TRIAL

"Generally speaking it is ground for new trial that the verdict is contrary to the evidence, or to the weight of the evidence. This statement may perhaps be somewhat too general. A more accurate statement deduced from the language of various courts is that a new trial will be granted where the verdict is plainly, manifestly, palpably, clearly, decidedly, or strongly against the evidence or the weight of evidence. Where the verdict is so strongly against the weight of evidence as to * * * indicate that the jury were influenced by passion, prejudice, or other improper motive, a new trial will presumably be granted in any jurisdiction."

29 CYC. 820, 821, 822, 823, 824, and cases cited.

Burke v. Wood, 162 Fed. 533, 541.

Collins v. Wilcox, 11 S. E. 142, 143.

Clark v. Jenkins, 38 N. E. 974, 975.

Tacoma v. Tacoma etc. Co., 47 Pac. 738, 746, 747.

Jones v. Smith, 158 Fed. 911.

McCoy v. Meodor, 78 S. E. 848.

Horsely v. Weaver, 78 S. E. 260, 263.

Louisville etc. R. Co. v. Henderson, 79 S. E. 556, 557.

Richardson v. Mallory, 79 S. E. 362;

Wardlaw v. Frederick, 79 S. E. 523;

Faulkner v. Hall, 150 S. W. 506, 507;

Iba v. Chicago, etc. R. Co., 157 S. W. 675, 678 et seq.

James v. Hood, 142 Pac. 162, 164.

Clark v. Georgia etc. Works, 79 S. E. 1131.

EVIDENCE DISCLOSES THAT VERDICT IS
CONTRARY TO AND AGAINST WEIGHT
OF EVIDENCE, AND THAT JURY
PLAINLY MUST HAVE CAPRIC-
IOUSLY AND ARBITRARILY
DISREGARDED UNCON-
TRADICTED AND
UNIMPEACHED
EVIDENCE

The plaintiff to prove her first cause of action called the following witness: Herself, an interested party, her husband, George Meyers, who was also her assignor on her second cause of action; and Louis Saloum, her brother-in-law by marriage (P. R. p. 60), and a witness who at the time of the trial had a suit pending against the defendant (P. R. p. 60). The defendant to disprove plaintiff's first cause of action called the following witnesses; himself, an interested party; George

Maloff, a man who had lived and worked for the defendant and who had previously been a witness for the defendant in another case; Joe Witsell, Mary Martin and Sarah Johnson who were not in any wise discredited or impeached nor contradicted on this point. The plaintiff and her husband were the only two witnesses who testified directly to plaintiff's first cause of action. The witness Louis Saloum did not testify to it, except while testifying in relation to the purported settlement, he stated that there was left "work and board for Mrs. Meyers, \$15.00 a month." (P. R. p. 59.)

The first cause of action was composed of a set of facts which under ordinary circumstances of life are exceedingly humble, private, secluded, and, therefore, difficult to disprove. None of the witnesses testified that the plaintiff ran a boarding house. There was no evidence that plaintiff had any other boarders. The defendant was alone; his wife was dead at the time and his children were in Pawtucket (P. R. p. 49). He could therefore only disprove the testimony of plaintiff and her husband by himself and other casual observers of his acts. Plaintiff did not call her children to corroborate the story of herself and husband; and the record is bare of her calling any persons, neighbors, boarders, or others in corroboration. On the contrary the defendant called the uncontradicted, unimpeached and non-discredited witnesses Mary Martin, Sarah Johnson and Joe Witsell, as well

as his friend George Maloff, to prove the small, ordinary, commonplace things of life, which are so uneventful that no record is kept of them, to show that during the same period referred to by the plaintiff and her husband the defendant had been doing his own cooking and had been eating his meals in a room off the store and that some of these witnesses had been doing his laundry work. As stated, this evidence was not contradicted, except of course by plaintiff's general statement, nor were the witnesses who gave it discredited and it was peculiarly probable and consistent because of its very lack of attempt at defiteness. It would have been far more improbable had these witnesses contended that they could remember a certain day and time on which they had seen the defendant do such a simple thing as eating and could remember it over a lapse of several years.

The record, therefore, shows as to the witnesses in the case: The plaintiff and defendant offset against each other; on behalf of plaintiff the witness George Meyers, the husband and assignor of plaintiff, who, although at the trial claiming that the defendant still owed him money, *had sworn under oath some three years prior to the trial* that "All the bills, accounts, choses in action, and any and all differences between defendant (George Meyers) and plaintiff, (Michael George) were taken into consideration, and were fully settled, paid and satisfied and formed the basis of such dissolu-

tion of said partnership between said plaintiff and defendant; and any and all claims which either party, the plaintiff (Mike George) or defendant (George Meyers) may have had against the other, were fully settled, paid and satisfied in full by reason of said absolute dissolution of said partnership" (Defendant's exhibit No. 3 P. R. p. 114, 115); and the witness Louis Saloum, brother-in-law of the plaintiff's husband, and a litigant against the defendant at the time of the suit; and on behalf of defendant, his friend George Maloff; and the three unimpeached, uncontradicted and *nondiscredited* witnesses, Mary Martin, Sarah Johnson and Joe Witsell.

There is nothing in the record to indicate that defendant's witnesses were any less credible than the plaintiffs. The five witnesses for defendant diametrically opposed the plaintiff's witnesses.

"While the weight of testimony does not necessarily depend upon the number of witnesses, yet where the witnesses are of equal credibility it may undoubtedly be increased by the number of witnesses. * * *. The court was specifically asked to set aside the verdict on the ground that it is contrary to the weight and the preponderance of the evidence. Under the circumstances of this case, we think this motion should have been granted, and that it was an absence of discretion not to grant the same."

McCoy v. Mil. Ry. Co., 52 N. W. 93,
94, 95.

In this connection it is illuminating to compare the consistency and probability of the testimony of the witnesses Witsell, Martin and Johnson with the improbable and inconsistent testimony of the plaintiff and her husband and her witness Louis Saloum as to her first cause of action. In her pleadings she contends that the defendant owes her \$345.00 for performing certain domestic services for him. No where in her testimony does she state how much it amounted to, although she admitted payment of \$72.50. In her reply (P. R. p. 8) she says that *defendant at her special instance and request, advanced and loaned her \$200.00 on or about the 20th day of January, 1915, and that she repaid it on April 12, 1915.* However, in her testimony she said; "Mike paid me some, about \$72.50, and I got it marked down in the book. My husband marked it in the book at the time I got the money. I told him to put it in the book. Since then I asked him three or four times, and he say, 'I ain't got much money.' * * * I didn't say anything to Mike about this last spring on April 12th. I never speak to Mike, and *I didn't borrow \$200.00 last spring from Mike.* I don't know who did borrow the \$200.00. *I didn't swear in my reply that I borrowed \$200.00.* I never asked Mike for the money at all after I come back, but I think my husband asked him, and I never asked Mike for

money on April 12, 1915." (P. R. p. 34.) Her testimony thus was in direct contradiction to her reply. George Meyers, her husband, testified "*I borrowed the \$200.00 from him*" (referring to the defendant.) (P. R. p. 55.) On rebuttal plaintiff contradicted herself and testified that *she was the one who borrowed the \$200.00* (P. R. p. 129). On rebuttal the witness George Meyers testified that the plaintiff, his wife, was present at the time of the loaning of the \$200.00, and that he, George Meyers, endorsed the check over to her (P. R. p. 124) and thus endeavored to contradict himself and show that his wife borrowed the \$200.00. Defendant's witness Hubbard stated that the defendant gave the witness George Meyers the \$200.00; that George Meyers alone signed the note; and that George Meyers endorsed the check over to plaintiff in the presence of defendant. (P. R. p. 102.) The defendant's contention was that he loaned \$200.00 to the witness George Meyers, (P. R. p. 72.) There is no question that the \$200.00 was repaid, and plaintiff said in her reply that it was repaid on April 12, 1915. Yet on April 9, 1915, three days before she contends it was paid, through her attorney Cobb, she wrote a letter to the defendant demanding payment on her first cause of action (Defendant's Exhibit No. 2, P. R. p. 83). It seems highly improbable that she would repay \$200.00 at a time when she had threatened suit against the defendant to recover \$390.00. On the other hand,

if ever since December 21, 1911, defendant had owed George Meyers \$345.00 why would George Meyers swear on December 22, 1912, that *any and all differences* between himself and the defendant had been fully settled, paid and satisfied (defendant's exhibit No. 3, P. R. p. 114, 115); and why did he not off-set the \$345.00 against the \$242.50 which he says he paid the defendant about a year after December 21, 1911, (P. R. p. 55); and why did he not off-set the \$345.00 against the \$200.00 which he says he borrowed in January, 1915, from the defendant and repaid to him before the suit was brought in May, 1915. (P. R. p. 55); and why would he on April 12, 1915, pay back the \$200.00 to defendant three days after his wife had made a demand upon defendant for payment of the first cause of action and within thirty-three days of the time that the suit was filed (P. R. p. 5), and within less than a month of the time that he afterwards claimed to have made the assignment to his wife on which she brought her second cause of action. These transactions are all exceedingly improbable taking either contention of plaintiff and her husband. Certainly if defendant owed either of them money they failed to act like ordinary persons would act under similar circumstances. There is nothing in the record to show that two sums, each amounting to \$200.00, were repaid. If plaintiff borrowed the money it was strange that she would repay it three days after she had made

a demand on defendant and threatened him with a suit for \$390.00. If plaintiff's husband borrowed it, it was strange that he would repay it, without suit, in the face of his contention that the defendant had owed him \$345.00 since December 21, 1911. So far as the domestic services claimed to have been performed by plaintiff for defendant are concerned, plaintiff's theory is, as a matter of fact, supported only by herself. The witness George Meyers was not in position to testify except as to sporadic periods, for as plaintiff says, "My husband was down in Seattle * * * some time my husband was down below." (P. R. p. 30, 31). Her husband, George Meyers, also testified that he was away part of the time. (P. R. p. 48.) Plaintiff's witness Louis Saloum did not testify as to plaintiff's first cause of action except to say that at the time of the alleged settlement, referring to the defendant and George Meyers, "they said some rent for Meyers and some work for Mrs. Meyers." (P. R. p. 58.) Yet, the witness, according to his own statements, although he had done the figuring for defendant and Meyers in arriving at their alleged stated account (P. R. p. 60), and knew that the defendant owed Meyers \$390.00 (P. R. p. 59), on the occasion of a former suit had testified "at that time I testified that all that was owing between these parties was that George Meyers owed Mike George \$242.50" (P. R. p. 610.) and said nothing about the defendant owing Meyers \$345.00 (P.

P. p. 63.) presumably because "nobody asked me about that." (P. R. p. 61) What kind of a man is this, who would sit idly by and say that Meyers owed the defendant \$242.50 and merely because he was not asked, say nothing about the fact that he knew that the defendant owed Meyers \$390.00, and thus permit Meyers, his brother-in-law, to be obliged to pay the \$242.50 to keep his store from being closed by attachment. (Ev. George Meyers, P. R. p. 55.)

It is also enlightening to examine the record as to defendant's loans of \$150.00 and \$175.00 to the plaintiff. Defendant (P. R. p. 68, 71) and the witness George Maloof (P. R. p. 86, 87, 88) both testified directly to the fact that these loans were made. Their story as to the loan of \$175.00 was circumstantially corroborated by the witness Fannie Williams (P. R. p. 98) who was unimpeached, uncontradicted and not discredited. The witness Maloof's testimony as to the loan of \$150.00 was also circumstantially corroborated by the unimpeached and *nondiscredited* witness Bothwell (P. R. p. 99). In fact Bothwell's testimony is corroborated by plaintiff (P. R. p. 130), except she denies that there was anything said about the money being tied in a handkerchief. There was no attempt to show that Bothwell had any interest in the case. We submit that his story is more credible than an interested party—the plaintiff. Furthermore, if plaintiff had received \$150.00 from

her husband to put in the bank (P. R. p. 130) in accordance with their general custom (P. R. p. 131) why did not her husband on rebuttal corroborate her story.

Inasmuch as plaintiff in no wise attempted to explain away the testimony of the witnesses Witsell, Martin, Johnson, Bothwell, and Williams, and as these witnesses were unimpeached and not discredited and were not even contradicted, except Bothwell by plaintiff as to the money being tied in the handkerchief, and Martin and Johnson by plaintiff that they had done defendant's washing after the dissolution of partnership (Ev. plaintiff P. R. p. 134) at which time the defendant had moved to a separate house from plaintiff and her husband (Ev. Meyers P. R. p. 49, 50) two blocks away (P. R. p. 60, Ev. Louis Saloum), it is evident that the jury must have capriciously and arbitrarily disregarded all of these witnesses and their testimony in order to reach their verdict.

"A verdict rendered contrary to, or in disregard of, evidence which was not improbable or inconsistent and was not contradicted or discredited will be set aside."

29 CYC. 830, and cases cited.

Kelly v. Morris, 6 Pet. 622; 8 L. Ed. 523.

Boe v. Lynch, 49 Pac. 381.

Chicago, etc. Ry. Co. v. Landauer, 54 N. W. 976, 980.

Wallace v. Weaver, 133 Pac. 1099.
Coffman v. Viquesney, 84 S. E. 1069.
Rankin v. Thompson, 3 Pac. 719, 721.
Alabama etc. R. Co. v. Scruggs, 45 S. E.
 689.

Central etc. R. Co. v. Mote, 48 S. E.
 136.

Sleeper v. Des Moines, 93 N. W. 585.
Algeo v. Duncan, 39 N. Y. 313, 315,
 316.

Hileman v. Maxwell, 149 N. W. 44.

“If, * * * the conclusion of the jury appears to have been arbitrary or capricious, or the jury plainly disregarded the uncontradicted testimony of a witness who was not impeached or discredited, even though he was a party to the actions, a new trial will be granted.”

39 CYC. 830, 831, and cases cited.

Mullen v. Butte, 95 Pac. 579, 599.

Wallace v. Weaver, 133 Pac. 1099, *supra*;

Gunn v. Union R. Co., 48 Atl. 1045.

Lee v. Chicago, etc. R. Co., 77 N. W.
 714, 717.

Lincoln v. Stowell, 72 Ill. 84, 86.

Chicago et. R. Co. v. Stumps, 55 Ill.
 367, 69 Ill. 409, 411.

Chavias v. Dry Dock etc. Co. 70 N. Y.
 Sup. 1014.

Cunningham v. Gans, 29 N. Y. Sup. 979, 980.

Sweaney v. Bledsoe, 27 Tenr. 487, 489.

MOTION FOR NEW TRIAL

a. AFFIDAVITS IN SUPPORT THEREOF NEWLY DISCOVERED EVIDENCE IS GROUND FOR NEW TRIAL

“Newly discovered evidence, material for the party applying which he could not with reasonable diligence have discovered and produced at the trial, is ground for a new trial.”

29 CYC. 881, and cases cited.

Blewitt v. Miller, 63 Pac. 157.

Kenezleber v. Wahl, 28 Pac. 225, 226.

Heinz v. Cooper, 38 Pac. 511, 511.

People v. Corty, 3 Pac. 608.

Wells etc. Co. v. Gunn, 79 Pac. 1029, 1030.

Harrell v. Gregory, 14 S. E. 186.

Atlantic etc. Ry. Co. v. Beauchamp, 19 S. E. 24, 26.

Florida etc. Co. v. Grant, 35 S. E. 271.

Oldfather v. Zent 41 N. E. 555, 556.

Roeser v. Pease, 131 Pac. 534, 535.

Marshall v. Barry, 142 Pac. 199, 200.

Jaquist v. Kelly, 151 N. Y. S. 187, 191.

Mason et al v. Meloan, 177 S. W. 435, 438.

EVIDENCE OFFERED IN AFFIDAVITS WAS
NEWLY DISCOVERED, MATERIAL, NON
CUMULATIVE, AND COULD NOT,
WITH DILIGENCE, HAVE BEEN
PRODUCED AT TRIAL

The defendant in support of his motion for a new trial filed affidavits of Julius A. Johnson (P. R. p. 152), Gustav A. Messerschmidt (P. R. p. 158), and Andrew Martin (P. R. p. 159). The facts which these affiants swore that they would testify to were material to the defense. Plaintiff's first cause of action consisted of a claim for domestic services and board and room, knowledge of which in the ordinary course of human events would be confined to the breasts of those constituting the family circle. The defendant was alone at the time and was not married nor did he have any family in Douglas. (Testimony of plaintiff, P. R. p. 630). The only proof, by which he could corroborate his denial of plaintiff's contention, would be by that of neighbors and visitors.² Of course the best proof would undoubtedly be to bring in at least one witness for each day, in consecutive order, of each of the twenty-six months over which the plaintiff contended the services ran. Thus approximately 790 witnesses would have been the best possible corroboration of his denial. However, it is practically impossible and altogether improbable that any man would keep such a minute rec-

ord of the common place affairs of his life as to be able to do this. He therefore did the next best thing. He denied the story himself (testimony of Mike George); he called the unimpeached and uncontradicted witness Witsell to testify that he saw the defendant do cooking in the room right off the store in 1910 (P. R. p. 85); he called his friend Maloff who said that the defendant used to eat in his room and that the plaintiff and her husband ate across the street, and that he never saw the plaintiff do any cooking or washing for the defendant and never saw her in the defendant's room (P. R. p. 85); he called the uncontradicted and undiscredited witness Mary Martin who said that the defendant had a cook stove and some dishes in his room and that some times he requested her to have a cup of coffee with him. (P. R. p. 93), and the unimpeached and undiscredited witness Sarah Johnson that she did the defendant's laundry work (P. R. p. 96, 97.) The affiant Messerschmidt swore that he would testify that on at least three or four occasions he had seen the defendant preparing, cooking and eating meals in the room off the store in which the defendant lived (P. R. p. 158); the affiant Andrew Martin swore that he would testify that on several occasions he had seen the defendant while the latter was eating in the room off the store in which the defendant lived, and that during the time covered by plaintiff's pleading affiant had eaten five or six meals

with the witness Meyers in the latter's residence and that the defendant was not present on any of those occasions (P. R. p. 160); and the affiant Johnson swore that he would testify that during the time Meyers and the defendant were in partnership, that affiant had placed and built a concrete chimney in the room off of said store, in which defendant was then living; that affiant was in said room on numerous occasions; that there was a small cooking range in said room; that he saw defendant preparing, eating and cooking meals and food in said room on several occasions; that affiant on one occasion saw the defendant buying meat in the butcher shop and that affiant himself on one occasion purchased meat for the defendant, and that affiant would corroborate the witness Sarah Johnson that she did washing for the defendant for a period of something over two years (P. R. p. 155). These facts are of course all small and uneventful, but highly consequential and important. While they all bear on the fact at issue, to-wit: that plaintiff did not perform services for defendant, yet they in themselves are each distinctly separate probative facts. These affiants are three more of the 790 witnesses required by defendant to prove the common place events of his life for each day of the 26 months. There is nothing in any of their affidavits to show that any of the occasions to which they refer were the same occasions as those testified to by plaintiff's

witnesses at the trial. While it is true that they all go to support the same issue, namely, that defendant's denial of plaintiff's contention is true, yet they are distinctly probative facts readily separable and plainly different, and, this being so, they were not cumulative.

"The generally recognized rule is that evidence of a distinct probative fact is not cumulative to evidence of another fact, although both facts support the same issue."

29 CYC. 908, and cases cited.

It is fair to assume that they ought to produce opposite results on another trial, because all the affiants are citizens of the United States, and are of European extraction, as distinguished from the witnesses at the trial, all of whom were either Assyrians or Indians, except the witness Bothwell, Hubbard and Witsell, and of the last three named only Witsell testified on the issue of which the affiants state they will testify. The evidence was discovered after the trial, and due diligence was used to procure it. (Affidavits of Robertson, p. 147, 151). There are no contradictory affidavits. It therefore follows that a new trial should have been allowed.

"A motion for a new trial on the ground of newly discovered evidence should be allowed where the evidence was in fact discovered after the former trial, due diligence was used to procure it, the evidence is material to

the issue, is not cumulative and ought to produce on another trial an opposite result.”

Hotchkiss v. Patterson, 48 Pac. 435.

b. ERRORS AND MISCONDUCT
 ERRORS IN LAW OCCURRING AT TRIAL
 AND EXCEPTED TO IS GROUND
 FOR NEW TRIAL

“A new trial should be granted for the erroneous admission of evidence which is incompetent, or otherwise inadmissible, and which may have influenced the jury in arriving at its verdict. The improper admission of the testimony of an incompetent witness, or the admission of secondary evidence without proper foundation, is ground for a new trial.”

29 CYC. 779, 789, and cases cited.

Under this rule we call attention to the various errors committed in the admissions and the exclusions of evidence, as set forth in the various Assignments hereinbefore discussed. It would seem needless repetition to re-state them here, but we urgently insist that these errors were so prejudicial that a new trial should be granted. We realize that no man can say just what the effect of the errors was. No man would attempt it except a clairvoyant or soothsayer. As the court said, in *Snider v. Power Co.*, 120 Pac. 88, 91, in referring to alleged errors arising out of misconduct at the

trial "Of course no man can say just what the effect of the misconduct was" and in which case the court approvingly quoted the statement of that learned jurist Justice Brewer, to-wit:

"All that can safely be laid down is that wherever in the exercise of a sound discretion it appears to the court that a jury may have been influenced as to their verdict by such intrinsic matters, however thoughtlessly or innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside."

Winter v. Sass, 195 Kan. 556, 566.

IRREGULARITIES AND MISCONDUCT EFFECTING VERDICT

And in connection with the statement of Justice Brewer just cited we call attention to the first and second paragraphs of Sec. 1058, C. L. A., *supra*, wherein irregularity and misconduct are made grounds for new trial. It is not for us to determine whether plaintiff's counsel's objectionable questions were uttered innocently and thoughtlessly, or intentionally and wilfully. However questions were put not once or twice, but many times, in such form throughout the trial that, considering the character of the witnesses, they could lead only to the creation of prejudice in the jury's minds.

Attention is called to the question put the defendant relative to the loss of the life of the plaintiff's two children by fire (P. R. p. 70, 71). A fact entirely immaterial to the case and which questions the plaintiff, being a woman, could certainly not have operated against her cause.

Attention is called to the question propounded the defendant as to whether or not he wished to answer the question fairly (P. R. p. 78). There is nothing whatever in the record to show that the witness was not answering fairly.

Attention is called to questions propounded the defendant assuming that his pleading stated that he had loaned the plaintiff \$200.00; that he uary 20, 1915 and \$175.00 on February 1, 1915; that he ha dloaned the plaintiff \$200.00; that he was in partnership with George Meyers and his wife (P. R. p. 79, 80). It is true that the court in each instance later corrected these questions, but the damage had already been consummated.

Attention is called to the repeated questions of plaintiff propounded the witness Maloff to another case in which plaintiff's counsel assumed that the defendant in the case at bare was interested. (P. R. p. 87, 88).

ERRORS OCCURRING WERE PREJUDICIAL

The repeated asking of these questions on extraneous matters, even in the face of the court's ruling, seems to us must have created prejudice

in the jury's mind. As stated, if such prejudicial questions had only occurred once or twice, we realize that it might be a serious matter to assume that any prejudice had arisen therefrom. However, when they occurred with such frequency it is impossible to predicate any other conclusion as a result of them than that they had an influence on the minds of the jurors in the reaching of their verdict. And, they having been injected in the trial by plaintiff, we urge that justice requires the granting of a new trial, so that opportunity may be given to try out the merits of the controversy, free from these extraneous, prejudicial matters. Furthermore, plaintiff has little to complain against the granting of a new trial. She did not recover the total amount claimed by her and if her contention be true, a new trial will undoubtedly afford her an opportunity to recover her full claim. On the contrary, defendant, without a new trial, is forever debarred from having a jury pass upon the merits of his claim, free from the extraneous, prejudicial matters which surrounded the trial.

FIFTIETH ERROR

THE FIFTIETH ASSIGNMENT OF ER-

ROR (P. R. p. 177, 178) relates to the making and entering on January 4, 1916, of the judgment (P. R. p. 14, 15, 16) in this action, adjudging that the plaintiff recover from the defendant the

sum of \$418.35 with interest at 8% from December 9, 1915, together with her costs and disbursements.

JUDGMENT SHOULD BE REVERSED WHEN
TRIAL COURT ERRED IN ITS RULINGS
ON MATERIAL POINTS TO THE PRE-
JUDICE OF THE APPELLANT

Conceiving, as we do, that the trial court erred in its rulings on the various material points hereinbefore discussed in the several assignments of error heretofore set out, namely, in the improper admission and exclusion of evidence, and in the improper denial of a new trial, and in the receiving and filing of the verdict, we respectfully urge that the judgment should be reversed on the ground that these errors were on material points, and were prejudicial to the defendant.

3 CYC. 553, and cases cited.

Forrest v. Portland, etc. Co., 129 Pac.
1048, 1050;

Armstrong v. High, 32 S. E. 590;

Clapp v. Engledow, 108 S. W. 462, 464;

Bank v. Gould, 24 S. E. 547, 548;

Maine, etc. Co. v. Boston, etc. Co., 37
Cal. 40, 50.

JUDGMENT WILL BE REVERSED FOR
SLIGHT ERRORS WHERE APPEL-
LATE COURT IS NOT SATIS-
FIED WITH ITS JUSTICE

We do not concede that the errors committed by the trial court were slight errors, but on the contrary we firmly believe that an examination of them will disclose that they were made on material and important points, and that by the erroneous rulings substantial prejudice has resulted to the defendant. The errors, are, however, so apparent, and the injustice of the verdict under the circumstances so plainly obvious, that we urge that even were the errors slight a reversal of the judgment should be granted, and a new trial granted defendant so that the merits of the controversy can be tried out free from extraneous, prejudicial matters.

3 CYC. 443, 444, and cases cited.
Tract Co. v. Lloyd, 105 N. E. 159;
Smidt v. Schweitzer, 137 N. Y. S. 807;
Freeman v. Moreman, 146 S. W. 1045;
Savannah etc. R. Co. v. Harrigan, 7 S.
E. 280;
Strawbridge v. Vandeburgh, 10 N. Y.
S. 610;
Goldstein v. White, 16 N. Y. S. 860.

ERROR IN ADMITTING INCOMPETENT EVIDENCE SHOULD NOT BE DISREGARDED AS HARMLESS

Even conceding for the sake of argument that the evidence is so nearly balanced, that the verdict would not be disturbed on appeal, it cannot be said that the defendant has not been prejudiced by the extraneous matters erroneously admitted.

2 R. C. L. 253.

And this is particularly so, when it is recalled that the incompetent evidence, inasmuch as plaintiff obtained a verdict, may have been the very evidence which led to the jury giving her the verdict.

Zucker v. Whiteridge, 4 L. R. A. (N. S.) 683, 695.

ADMISSION OF IMMATERIAL EVIDENCE,
TENDING TO MISLEAD JURY OR INFLAME THEIR MINDS AGAINST
ONE OF THE PARTIES, IS
GROUND FOR REVERSAL

The evidence as to the loss of the lives of plaintiff's two children and as to the defendant having interest in another action against the witness George Meyers and his wife, the plaintiff, was entirely immaterial to this case. Its only tendency could have been to mislead the jury and inflame their minds against the defendant. Its immater-

ialty, if it be so conceded for sake of argument, does not therefore obviate its injurious tendency, and its admission is ground for reversal.

38 CYC. 1416, 1417, 1418, and cases cited.

Sterne v. Mariposa Com. Etc. Co., 97 Pac. 66, 67.

Title Ins. & Trust Co. v. Ingersoll, 94 Pac. 94, 97.

Ferguson v. Mines, 93 Pac. 867, 868.

Hardy v. Martin, 89 Pac. 111, 113.

Pyle v. Percy, 55 Pac. 141, 142.

Lissak v. Crocker Est. Co., 51 Pac. 688.

Cincinnati etc. Co. v. Thompson, 102 Pac. 848, 849.

Meek v. Dougherty, 97 Pac. 557, 558.

Klander-Weldon Dyeing Mach. Co. v. Gaynor, 166 Fed. (C. C. A. 2 Cir) 287, 288.

Leedy v. Lehfeldt, 162 Fed. (C. C. A. 9 Cir) 304, 306.

Meeker v. Printing Co., 135 Pac. 457, 459.

De Frutas v. Suisun, 149 Pac. 553, 555.

Hoffman v. So. Pac. Co., 143 Pac. 1032, 1033.

Sc. Am. Bank v. Long, 134 Pac. 913, 914.

Brison v. McKellop, 138 Pac. 154, 156.

Chadwick v. O. W. R. & N. Co., 144 Pac.
1165, 1170.

Shepard v. Denver & R. G., 145 Pac.
269, 300.

Bank v. Roseberry, 148 Pac. 1034, 1037.

McIntosh v. McNair, 99 Pac. 74, 75.

Boise v. A. T. & S. F. R. Co., 51 Pac.
662, 663.

George v. McManus, 150 Pac. 73, 75.

Marsteller v. Leavitt, 62 Pac. 384, 385.

Aldrich v. Col. So. R. Co., 64 Pac. 455,
460.

Sudden & Christenson v. Morse, 92 Pac.
901, 902.

Atchinson etc. R. Co. v. Ringle, 80 Pac.
43.

Denver & R. G. Co. v. Frederic, 140 Pac.
463, 468.

Hoffman v. Watkins, 136 Pac. 664, 665.

EXCLUSION OF COMPETENT MATERIAL EVIDENCE IS REVERSIBLE ERROR

The evidence offered by way of cross-examination of plaintiff relative to the assignment and to the entries in the book were material to the issue, i. e.: both went to issues in the case, the proof of which was necessary under plaintiff's pleadings. In the one instance there could be no better proof of the circumstances of the assignment, than the testimony of one of the parties to it, and plaintiff

was the assignee therein. In the other instance, what better proof could be required than the testimony of the person, namely, plaintiff, on whose behalf, at least part of the book entries had been made, and on whose behalf, as she was the assignee bringing the action, the entire book entries were offered as evidence.

The evidence offered by way of cross-examination of the witness George Meyers also went to the issues of the case, the proof of which was necessary. He had testified that the book was in his writing, and had stated what he claimed was disclosed by the entries on plaintiff's exhibit "B." The book was his making; he brought it into court to support the case of his wife, who was also his assignee. Presumably there could have been no better evidence which could be produced, than to show on cross-examination what the entries actually were.

This evidence was therefore material and competent, and its exclusion is reversible error. Particularly is this so, when it is impossible to say that the jury would have returned the same verdict if it had been admitted.

2 R. C. L. Sec. 207, p. 255, 256.

Gambrill v. State, 17 L. R. A. (N.S.)
291, 292.

"Where the evidence is in direct conflict the exclusion of competent evidence is a matter of much more consequence than it would be where the tes-

timony on the point was substantially all one way."

Chlanda v. St. Louis T. Co., 112 S. W. 249.

"Thus where the evidence is so conflicting that it is doubtful whether plaintiff has sustained his burden of producing a preponderance of evidence almost any error in the exclusion of evidence offered by defendant becomes material."

Fink v. Glanter, 121 N. Y. Sup. 297.

Tulley v. Board, etc. 67 Pac. 346, 347.

Lees v. Potter, 74 Pac. 622.

"The exclusion of proper evidence directly corroborative of the evidence of a party, in conflict with the testimony of the adverse party, is prejudicial."

Hanson v. Kline, 113 N. W. 504.

"Where the evidence consists principally of the testimony of the parties, each in support of his own claim, it is substantial error to exclude any testimony legitimately bearing on the weight to be given to the testimony of the parties."

Broadwell v. Conover, 79 N. E. 402.

Considering that the record discloses on its face many palpable errors, but does not in any wise affirmatively disclose that these errors were not prejudicial, we think that it must be conceded that a presumption of prejudice against the defendant exists from these errors.

3 CYC. 386, and cases cited;
Mexia v. Oliver, 148 U. S. 664; 37 L.
 ed. 602;
Vicksburg etc. R. Co. v. O'Brien, 119
 U. S. 99, 103; 30 L. ed. 299.

And in view of the manifest errors so occurring
 at the trial to the manifest prejudice of defendant,
 we urge that the judgment entered by the trial court
 be reversed and a new trial be granted, and we
 respectfully pray that it be so ordered.

Respectfully submitted,

GUNNISON & ROBERTSON,
 Attorneys for Plaintiff in Error.

NO. 2805

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

MICHAEL GEORGE,
Plaintiff in Error

VS

MRS. GEORGE MYERS,
Defendant in Error.

Brief of the Defendant in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA, DIVISION
NUMBER ONE

CHENEY & ZIEGLER,
Attorneys For Defendant in Error.

(THE EMPIRE Print)

Filed

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STATEMENT OF THE CASE

In the lower court Mrs. George Myers was plaintiff and Micheal George defendant. Plaintiff sued defendant upon two causes of action. The first cause was based upon a claim for services rendered; the second cause was based upon a claim for rent for a store building occupied and used jointly by plaintiff's husband and defendant. This claim was assigned to plaintiff by her husband. Defendant entered a general denial to each cause of action and pleaded a counter claim for money loaned by defendant to plaintiff. There was a trial by jury, verdict returned for \$418.35 and judgment upon the verdict for that amount.

It was a simple case, depending entirely upon questions of fact, no questions of law being involved. Although the case involved nothing more than a matter of disputed accounts, it was bitterly contested. It occupied two days for the trial. Counsel for defendant thereafter occupied three days in the argument of a motion for new trial. Counsel for defendant objected to almost every question propounded by Plaintiff's counsel during the trial and took exception to almost every ruling made by the court.

Fifty errors were assigned, P. R. 168 to 178, inclusive. Counsel for plaintiff in error rely upon only fifteen of the errors assigned. In replying to

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Fifty errors were assigned, P. R. 168 to 178, inclusive. Counsel for plaintiff in error rely upon only fifteen of the errors assigned. In replying to

counsel's brief we will notice only seven of the fifteen errors relied upon, namely, third, fourth, ninth, eighteenth, nineteenth, twenty-first and twenty-sixth. Errors number thirty-first, thirty-fifth, thirty-sixth, thirty-seventh, forty-sixth, forty-eighth, forty-ninth and fiftieth are so obviously technical, not to say frivolous, that they merit no consideration.

ERRORS DISCUSSED

The Third Error: In the brief for plaintiff in error the following statement is made: "The third error assigned related to the refusal to permit cross examination of plaintiff testifying in her own behalf in regard to the assignment which she testified had been made to her by her husband and which she pleaded had been made for good and valuable consideration." An examination of the record, page 36, does not show that counsel was refused the privilege to examine the plaintiff in regard to the assignment of the rent account. The court sustained an objection to the question as to how much money she paid her husband for the rent account.

Counsel for defendant then asked the witness: "Was the assignment in writing Mrs. Myers?"

The Court: "She doesn't know what assignment means." Counsel did not attempt to question the witness further as to the assignment. He might have called an interpreter to explain his question

and might have asked the witness any questions he desired as to whether or not the assignment was in writing, when, how, and where it was made. He did not choose to do this but seemed at the time perfectly satisfied to let the matter drop.

There is no merit in the error assigned because:

First: Plaintiff based her complaint upon two causes of action. In her first cause she sued for \$317.50, with interest at eight per cent. per annum from December 21st, 1911, for services performed for the defendant; her second cause was based upon an account due for rent amounting to \$345.00, with interest at eight per cent. thereon from December 21st, 1911, P. R. 1-2-3. Plaintiff recovered upon her first cause of action only; the verdict of the jury was for \$317.50, with interest at eight per cent. per annum from December 21st, 1911, to the date of the verdict, viz: December 10th, 1915, the amount of the verdict being \$418.35 (see affidavit of jurors P. R. 161). The affidavit of the jurors shows that they found in favor of the plaintiff on her first cause of action for services rendered; that they found in favor of the defendant on the second cause of action which was for the rent; that they found in favor of the plaintiff on the counterclaim pleaded in the defendant's answer. The jury could not under the evidence have

returned a verdict for the sum of \$418.35 in any other view of the case. As defendant was successful as to the second cause of action for the rent, he can not now be heard to complain of any errors alleged to have been committed by the court in the admission or rejection of evidence upon that cause of action.

All of the errors relied upon and discussed by counsel in their brief, excepting the twenty-first, twenty-sixth, thirty-first, thirty-seventh, forty-sixth, forty-eighth, forty-ninth and fiftieth, relate to the second cause of action for the rent.

Second: Even if counsel should contend that the jury found for the plaintiff upon the cause of action for the rent, which cause was assigned to her by her husband, nevertheless the judgment should not be reversed.

In an action by an assignee against the debtor he need not aver consideration for the assignment (5 *Corpus Juris* Pg. 1010 Sec. 230).

Welch vs. Mayer, 36 Pac. 613.

Nor is it necessary to set out the consideration for the assignment (5 *Corpus Juris* Pg. 1010 Sec. 230). An assignee of a chose in action may maintain an action in his own name though he pays no consideration therefor.

King vs. Miller, 53 Ore. 53; 97 Pac. 542.

5 *Corpus Juris* 994 Sec. 199.

It has been held that even though the plaintiff fails to plead an assignment but offers evidence of the assignment, the defect in the pleading is cured by the verdict.

Lassiter et al, vs. Jackman, 88 Ind. 118.

Webster et al, vs. Williams, 37 N. W. 62.

Haviland vs. Johnson, 139 Pac. 720.

In the case at bar the assignment was properly pleaded; there was evidence to support the pleading and the jury found a general verdict in favor of the plaintiff. It is said in 5 *Corpus Juris* Pg. 1021 Sec. 265, "Verdict and findings. A Finding in accordance with the allegations of the complaint is sufficient to establish an assignment where the facts constituting an assignment are stated in the complaint."

In the case of *Haviland vs. Johnson*, supra, decided by the Supreme Court of Oregon, March 17th, 1914, the following language was used by Justice Bean: "Objection is made that the court allowed evidence of the assignment of the chose in action for collection under an averment that it was assigned for valuable consideration. An assignment of a claim for the purpose of collection is based upon a valuable consideration and is sufficient. Defendant was not thereby prevented from making any defense that he could have made had Eisman (the assignor) brought the action in his

own name. Eisman was a witness in the case and is bound by the judgment.' ”

This was a suit brought by Haviland vs. Johnson upon an account assigned to the plaintiff by one Eisman. In the case at bar the only interest Michael George, the defendant, could have in the assignment of the rent account by Mr. Myers to the plaintiff was in knowing that he would be protected against a second suit upon the same account by Mr. Myers. Myers having testified for his wife at the trial certainly acquiesced in the assignment and is bound by the judgment. Mrs. Myers testified that he had assigned the account to her for the purpose of collection in this suit. See stipulation as follows.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL GEORGE,

Plaintiff in Error,

vs.

No. 2805

MRS. GEORGE MYERS,

Defendant in Error.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between Gunnison & Robertson, attorneys for plaintiff in error and Cheney & Ziegler, attorneys for defendant in error, that the testimony of Mrs. George Myers as taken down and transcribed by Mrs. L. A. Green, the official

court reporter, who reported the case, reads as follows:

Q. Did Mr. Myers assign this account over to you to put in this case?

A. Yes.

Q. This account for rent?

A. Yes.

Mr. Cheney: That is all.

IT IS FURTHER STIPULATED that the foregoing testimony shall be substituted in the place of the statement found at the bottom of page thirty-two of the P. R., which reads as follows:

“Mr. Myers assigned over to me this account for rent in this case.

GUNNISON & ROBERTSON,

Attorneys for Plaintiff in Error.

CHENEY & ZIEGLER,

Attorneys for Defendant in Error.

Original stipulation filed.

There can be no doubt that the judgment, even if Mrs. Myers, the plaintiff, had obtained judgment on the assigned account, would have been an ample protection against a second suit by the assignor. Plaintiff in error does not claim that the assignment was not bona fide and valid but his counsel insist that they should have been permitted to question the plaintiff as to how much she paid her husband for the account. It is im-

material whether she paid him anything at all for the account.

The Alaska Statute provides that every action should be prosecuted in the name of the real party in interest. If plaintiff in error had desired to raise the question as to whether there was a valid assignment, it was incumbent upon him to raise it by answer, setting forth therein that the plaintiff was not the real party in interest.

The Fourth Error: This error is based upon the ruling of the court sustaining the objection to the following question:

Q. "About the rent in there, did your husband write about the rent too?" At the time this question was asked the witness, page two of the book which contained the rent account had not been put in evidence, had not been identified, nor had she been questioned about it. All of Mrs. Myers' testimony as to the entries in the book had been confined to the entries concerning the services which she had performed for the defendant.

P. R. 31 she said, "That is the book I had my husband put it down when he paid *because of the work* that is all, I charged him \$15.00. He say, 'You do the work for me and I pay you what it is worth' and I charged him \$15.00 a month and he never paid me anything except what is in the book, \$72.50."

Counsel for plaintiff in error have attempted to make it appear that Mrs. Myers was speaking of the entries on page 3 concerning the rent account. If counsel had desired to convince the Appellate Court of the correctness of their contention they should have printed that portion of the testimony in questions and answers instead of narrative form. The most that could possibly be said in their favor is that it is doubtful on account of the questions being left out of the record as to whether or not Mrs. Myers referred to the account for services or to the account for rent.

However, continuing the testimony of Mrs. Myers on page 36 where the questions are omitted it does appear that the only statement made by the witness regarding the rent was as follows: "My husband wrote in the book about the rent." It is perfectly apparent that there should have been a period after the word, "rent" because the rest of the testimony following the word shows that she was speaking of her account for services rendered. She says, page 36, "That is the work I am talking about." All of the testimony shows that nothing was ever paid to Mrs. Myers upon the rent account but defendant did pay her the sum of \$72.50 upon her account for services and those payments, she had her husband enter in the book.

The cross examination should be limited to the matters brought out in direct examination.

We beg to cite counsel's authorities cited in their brief under the head of the thirty-sixth error, pages 55 and 56. Mrs. Myers had not testified nor had she been questioned concerning page 3 of the book which contained the entries regarding the rent account. The question was not proper cross examination.

Counsel for plaintiff in error had ample opportunity to question Mrs. Myers further when she was recalled in rebuttal and after the book had been introduced in evidence.

And, further, as plaintiff did not recover on her rent account, the error, if error it was, was harmless.

The Ninth Error: This error is predicated upon the refusal of the court to require the witness, George Myers, to read the items in the book which were written in the Assyrian language and translate them into the English language. P. R. 53, shows that the court refused to compel the witness, George Myers, to read the items and translate them into English.

The court did not refuse to allow counsel for plaintiff in error to have the items translated by anyone capable of making the translation. That the court was justified in refusing to compel the witness, George Myers, to translate the writing is clearly shown not only because the witness had said he could not translate the items, P. R. 53, but

because the court on direct examination had tried the experiment which resulted in failure.

At the bottom of page 44, P. R., the court said: "If the jury and the court can not understand the rest of the testimony any more than they understand that, we will have to have an interpreter."

Referring to P. R. beginning on page 38, to and inclusive of page 47, it will be seen that George Myers could not translate the writing into English and that after laboring with the witness for a long time it became necessary to call in an interpreter. The interpreter then read and translated the items. When Mr. Robertson again tried to compel the witness to translate, evidently the court did not feel like wasting more of its valuable time by experimenting with the witness.

Plaintiff in error could have called an interpreter if he really desired to have the items translated. The record shows that George Myers could neither read nor write the English language, that he could not translate the Assyrian language into the English language.

It would seem that a judge who has patiently labored for two days over a little, simple case such as this and especially where the witnesses are nearly all either Assyrians or Indians, ought to be permitted to exercise his own good judgment in regulating the proceedings.

Counsel argues in support of this error that the court erred in stating, "The whole thing is incompetent, irrelevant and immaterial at this time because all that he has done is simply that this man has identified that page; he simply says that this is his writing." The court, no doubt, had a right to rule that counsel should call an interpreter. The reasons stated by the court for the ruling are immaterial if the court was right in rejecting the question.

"An assignment of erroneous reasons for rejecting evidence is not sufficient to authorize reversal of judgment if such ruling may be upheld on other grounds."

Selsby vs. Foote 14 How. U. S. 218
14 Law Ed. 218-221.

3 Cyc. 222.

Plaintiff did not recover on the rent account, therefore defendant was not injured.

The Eighteenth Error: This error is based on the refusal of the court to sustain an objection to the following question:

Q. "Now what I want to get at, what do you mean by the word 'settling'—do you mean they pay afterwards; was there anything more said about them settling—?"

By reference to page 63, P. R., it will appear that the objection was made before the question was completed. It is impossible to determine

what the rest of the question might have contained.

It is sufficient answer to counsel's argument under this assignment to refer to the fact that the witness was an Assyrian, that his testimony was almost unintelligible, not because he could not speak English but because he could not make himself clear. The transactions between these people regarding their business affairs were very much mixed and difficult for a foreigner to explain and more difficult for another to understand. Leading questions are usually allowed under circumstances such as these. Defendant could not be injured as no recovery was had for rent.

The Nineteenth Error: Counsel complains of the ruling of the court in sustaining an objection to the following question:

Q. "Louis, in that case you were talking about a moment ago in the Commissioner's Court, wasn't George Myers asked whether or not Mike George owed him any money?" Counsel says, "The question was intended to elicit admission against interest made by plaintiff's privy."

It appears from the printed record that George Myers himself testified before the witness, Louis Saloum. The question asked might have been competent in the cross examination of George Myers but it was not competent for counsel to ask Louis Saloum what George Myers had been asked in some other court regarding an entirely differ-

ent case. What Myers had been asked could never be material, what he answered, might be. The question evidently concerned the account for rent upon which issue, as before stated, the palintiff in error was successful.

The Twenty-First Error: Under this assignment plaintiff in error was asked the following questions:

Q. "At the time of that fire there were two of her children burned?"

A. "Yes sir."

Mr. Robertson: "We object to that as immaterial."

Q. "And didn't it make any impression on your mind so you can tell the jury when that happened? Those two children and lots of the goods that were in the building lost, and still you don't remember when that fire occurred."

Mr. Robertson: "We object to that as argumentative."

The P. R., page 70, shows that the first question was answered before the objection was made. Counsel did not move to have the answer stricken. Not having moved to strike the answer, counsel can not now complain.

The second objection was based upon the ground that it was argumentative; surely such an objection is not tenable.

The whole record in this case shows that the

date of the fire was very important; it was important for the plaintiff in error fixing the time when he claimed he had ceased to board and room with the defendant in error.

In the cross examination of Mrs. Myers, P. R. 33-34 and 35, it appears that counsel for plaintiff in error questioned Mrs. Myers three or four different times regarding the fire. On page 33 she testified, "He slept in the kitchen until the house burned down when he moved down stairs." At the bottom of page 34, she testified "And he slept in the kitchen all the time until the house burned." On page 35 near the top, she testified, "The store belonged to me and the up-stairs burned and left the down stairs and Mike slept in a room next to the store and we moved across the street."

Counsel for plaintiff in error evidently thought the date of the fire was a very important matter, still he objects because counsel for defendant in error alluded to the fact of the children being burned and the loss of a stock of goods, in attempting to fix the date of the fire. This objection is sufficiently answered by the court in its decision on the motion for a new trial. P. R. 10.

The Twenty-Sixth Error: The question was: Q. "Do you know anything about a case that Mike George is interested in with Mrs. George Myers entitled W. G. Hills vs. Mrs. George Myers?" P. R. 87.

The witness, George Maloof, had testified, P.

R. 87. "I have been a witness for Mike several times before in the Commissioner's Court. He couldn't lose a case where I was a witness."

The question was only preliminary, as stated by counsel for defendant in error. As the question was not answered, it could not have resulted in injury to the plaintiff in error.

ARGUMENT

Replying to counsel's brief on the questions:

First: That the verdict is not supported by the evidence;

Second: That the evidence discloses that the verdict is contrary to and against the weight of the evidence;

Third: That the plaintiff in error is entitled to a new trial on the ground of newly discovered evidence.

We have little to add to the decision of the lower court found in the P. R. page 10.

The court in its decision, P. R. page 12, says: "Plaintiff had witnesses as to the truth of all the material allegations of her complaint and the defendant had witnesses denying the truth of those allegations, and all said testimony went to the jury; it was a simple case, there was nothing in it but the credibility of witnesses."

In this connection it must be borne in mind that all the parties interested in the suit were

Assyrians and that all of the witnesses who testified in the case were either Assyrians or Indians, with the exception of four, the four exceptions being Anderson, Bothwell, Witsell and Hubbard. Neither Bothwell nor Hubbard testified regarding the first cause of action.

The Assyrians were all related to each other; the Myers family and the George family had been in business together for a number of years and were acquainted in the Old Country. Few of them could read or write and none of them spoke the English language fluently.

It was a case where leading questions were necessary to elicit the facts. It would be too much to expect that counsel for either side should be confined to the strict rules of procedure in this respect. An examination of the record will show that counsel for plaintiff in error objected to almost every question propounded by counsel for defendant in error throughout the whole course of the trial. This is shown in all parts of the record where it is printed in questions and answers.

It would appear that counsel for plaintiff in error were more intent upon securing some ruling from the court upon which they could base an error than they were in eliciting the facts of the controversy from the witnesses. This is especially apparent in the first error assigned, being number three, where counsel asked the witness, Mrs. Myers, concerning the assignment. The court

stated that she did not understand what the word "assignment" meant. Counsel immediately took exception without attempting to pursue the matter any further. He had an opportunity to call an interpreter if he so desired but it seemed that he was more anxious to stand upon his objection than he was to call an interpreter and proceed with his questions.

The character of the objections made by counsel for plaintiff in error appear from examination of pages 118 to 125, of the P. R. We call the court's particular attention to these pages of the record.

We believe that no substantial error has been committed by the court in the trial of this case and respectfully pray that the judgment be affirmed.

Respectfully submitted,

Attorneys for Defendant in Error.

Copy Received and Service Admitted this.....

Day of November, A. D., 1916.

Attorneys For Plaintiff in Error.

In The
United States
Circuit Court of Appeals
For the Ninth Circuit

MICHAEL GEORGE,

Plaintiff in Error

VS.

MRS. GEORGE MYERS,

Defendant in Error

Reply Brief of Plaintiff in Error

Upon Writ of Error to the United States District
Court for the District of Alaska,
Division No. 1

GUNNISON & ROBERTSON

Attorneys for Plaintiff in Error

Filed

NOV 29 1916

E. D. Monckton,

In The
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MICHAEL GEORGE,

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Reply Brief of Plaintiff in Error

Upon Writ of Error to the United States District
Court for the District of Alaska,
Division No. 1

GUNNISON & ROBERTSON

Attorneys for Plaintiff in Error

REPLY OF PLAINTIFF IN ERROR

The keynote of plaintiff's brief is that the judgment should be sustained because she did not recover on the rent account, which is set up in her second cause of action, and to which plaintiff asserts the third, fourth, ninth and nineteenth errors related. As proof of this plaintiff refers to the affidavit of jurymen.

(P. R. p. 161)

Without this affidavit it must be admitted that there is nothing in the record to indicate whether plaintiff recovered on one particular cause of action or on both.

In *Glaspell vs. North Pacific R. Co.*, 43 Fed. 900 at 909, the Court said:

"Upon the grounds of public policy, the Courts have almost universally agreed upon a rule that no affidavit, deposition, or sworn statement of a juror shall be received to impeach the verdict or to *explain it, or show on what grounds it was rendered.*"

See also *McDonald vs. Pless*, 206 Fed. (4th C. C. A.) 263, at 265, which lays down the same doctrine.

It therefore follows that plaintiff's entire theory, viz: that no error was committed as she did not recover on the rent account, falls flat, there being no competent evidence in the record to disclose the fact upon which plaintiff bases her major premise.

Before passing it occurs to us to point out that plaintiff's criticism of the printed record is not warranted as the record itself shows that her counsel placed his "O. K." upon and approved the bill of exceptions before the order allowing it was made by the trial court.

(P. R. p. 165)

We submit that such being the fact it is too late to question the record and that such approval constitutes an agreement that the bill of exceptions is correct.

Ry. Co. vs. Jackson, 64 Fed. 79 (8th C. C. A.)

The Third Error: Plaintiff contends in her brief that defendant's third assignment of error is based upon false premises. This contention is based upon the fact that the defendant, after the exclusion of the question:

"How much did you pay your husband, Mrs. Meyers, for this account that he has got against Mike George?" (P. R. p. 36), asked the further question:

"Was the assignment in writing, Mrs. Meyers?" (P. R. p. 36).

It is very apparent from the record that the trial court of its own volition excluded the latter question because the trial court thought that the witness did not know what the word "assignment" meant. However, the witness should have been permitted to state for herself whether or not she knew the meaning of the word; and in view of the fact that she had previously answered, without it being explained to her, the question put by her counsel:

"Did Mr. Meyers *assign* this account over to you to put in this case?" (Plaintiff's Brief, page 11), in which the verb form of the word "assignment" was used, it is fair to

assume that she did know the meaning of the word.

Plaintiff evidently places great weight on the decision laid down in *Haviland vs. Johnson*, 139 Pac. 720. However, in that case Judge Bean simply held that an assignment of a claim for the purpose of collection is based upon a valuable consideration, and therefore evidence of the former was competent under an allegation of the latter. There is nothing to indicate that the court in that case did or would not permit cross-examination as to the assignment. Plaintiff contends in her brief that she testified that her husband assigned the account to her for the purpose of collection. (Plaintiff's brief p. 10.) We submit that there is no such testimony in the case. The stipulation set up in her brief does not disclose any such evidence nor can the words "to put in this case" under any definition laid down by any lexicographer be given the meaning "for the purpose of collection in this suit". However, even if the plaintiff had in her testimony used the identical words "for the purpose of collection in this suit", we submit that this would not cure the error of which the defendant complains, which is that he was deprived of his right to cross examine the plaintiff on one of the material matters set up in her complaint which it was necessary for her to plead and prove.

Calloway vs. Oro Mining Company, 89 Pac. 1070

Ninth Error: We desire simply to call attention to the fact that this witness had previously testified that the entries in the book were in his hand writing (P. R. p. 38, 53); and the plaintiff herself had testified that the book was in his handwriting (P. R. p. 31).

In conclusion we respectfully submit that errors were

committed in material matters in the proceedings in the case to the substantial prejudice of defendant, and that there is nothing either in the printed record or in the brief of plaintiff which demonstrates that those errors did not and could not have prejudiced the rights of the defendant. This being true, we again urge that the rule should be followed which is laid down by the Supreme Court of the United States in *Vicksburg & Meridian Railroad vs. O'Brien* wherein the court at 119 United States, page 103, said:

“While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party.”

We therefore earnestly pray that the judgment of the trial court be reversed.

Respectfully submitted,

GUNNISON & ROBERTSON

Attorneys for plaintiff in error

No. 2809

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff in Error.

vs.

WILLARD N. JONES,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the District Court of the United
States for the District of Oregon.

Filed

F. D. Monckton,

Attorney

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff in Error.

vs.

WILLARD N. JONES,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the District Court of the United
States for the District of Oregon.

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IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

United States of America,

Plaintiff in Error,

vs.

Willard N. Jones,

Defendant in Error.

**NAMES AND ADDRESSES OF THE
ATTORNEYS OF RECORD :**

Mr. Clarence L. Reames, United States Attorney, and
Mr. Barnett H. Goldstein, Assistant United States
Attorney, Post Office Building, Portland, Oregon,
for the Plaintiff in Error.

Fulton & Bowerman, Yeon Building, Portland, Oregon,
and Schwartz & Saunders, Lewis Building, Port-
land, Oregon, for the Defendant in Error.

CITATION ON WRIT OF ERROR

United States of America,
District of Oregon—ss.

To Willard N. Jones, defendant; Fulton and Bowerman, and Schwartz and Saunders, attorneys for the said defendant,

Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 24th day of May in the year of our Lord, one thousand, nine hundred and sixteen.

R. S. BEAN, Judge.

United States of America,

District of Oregon—ss.

Due service of the foregoing Citation on Writ of Error, by receipt of a copy thereof duly certified to by Barnett H. Goldstein, Assistant United States Attorney for the District of Oregon, and attorney for the plaintiff herein, together with a like certified copy of a Petition for Writ of Error, Order allowing writ of error, Assignment and Writ of Error, is hereby admitted in Portland, Oregon, this 24th day of May, 1916.

C. W. FULTON,

Attorney for Defendant and Defendant in Error.

Filed May 25, 1916.

G. H. Marsh, Clerk.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.
UNITED STATES OF AMERICA,

WRIT OF ERROR.

Plaintiff in Error,

vs.

WILLARD N. JONES,

Defendant in Error.

The United States of America, ss.

The President of the United States of America,

To the Judge of the District Court of the United States
for the District of Oregon:

Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton one of you, between United States of America, Plaintiff and Plaintiff in Error, and Willard N. Jones, Defendant and Defendant in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White,
Chief Justice of the Supreme Court of the United States
this 25th day of May, 1916.

(Seal)

G. H. MARSH,

Clerk of the District Court of the United States for the
District of Oregon.

By F. L. Buck, Deputy.

Service of the above Writ of Error made this 25th
day of May, 1916, upon the District Court of the United
States, for the District of Oregon, by filing with me as
Clerk of said Court, a duly certified copy of said Writ
of Error.

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

By F. L. Buck, Deputy.

Filed May 25, 1916. G. H. Marsh, Clerk, United
States District Court, District of Oregon.

*In the District Court of the United States for the
District of Oregon.*

March Term, 1912.

BE IT REMEMBERED, That on the 11th day of
June, 1912, there was duly filed in the District Court

of the United States for the District of Oregon, a Complaint, in words and figures as follows, to-wit:

COMPLAINT.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

Complainant,

vs.

Willard N. Jones,

Defendant.

Comes now the United States of America by John McCourt, United States Attorney in and for the District of Oregon, pursuant to the direction and authority of the Attorney General of the United States, and complains of the defendant Willard N. Jones, and alleges as follows:

I.

That the lands hereinafter described, together with a large area of other lands, were prior to the 16th day of May, 1895, a part of and included within the limits and boundaries of the Siletz Indian Reservation in the State of Oregon; that theretofore, on or about the 31st, day of October, 1892, certain articles of cession and agreement were made and concluded at the Siletz Agency in the State of Oregon, by and between the

United States of America and the Alsea and other Indians in the said Siletz Reservation, whereby said Alsea and other Indians, for the consideration therein mentioned, ceded and conveyed to the United States of America, all their claim, right, title and interest in and to all the unallotted lands within the limits of said reservation, except five sections of land described in Article IV of said agreement, none of which lands so excepted are or were included within the lands hereinafter described. The lands hereinafter described were among the unallotted lands above mentioned and among the lands opened to settlement and entry as hereinafter alleged.

II.

That thereafter on the 15th day of August, 1894, the Congress of the United States duly and regularly passed an act entitled,

“An Act making appropriations for current and contingent expenses of the Indian Department in fulfilling treaty stipulations with various Indians tribes for the fiscal year ending June 30, 1895, and for other expenses.”

28 Stats. L. 286-326.

That in and by said last mentioned Act of Congress, said articles of cession and agreement between the Alsea and other Indians in said Siletz Reservation and the

United States, hereinabove mentioned, was accepted, ratified and confirmed and provision was made for disposition of said ceded lands by the United States as follows:

“The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law, under the town-site law and under the provisions of the homestead law; provided, however, that each settler under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years’ actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.”

It was further provided, in and by said act that immediately after the passage thereof, the Secretary of the Interior should, under such regulations as he might prescribe, open said lands to settlement, after proclamation by the President and sixty days’ notice; that thereafter on the 16th day of May, 1895, the President of the

United States by proclamation, duly and regularly given and made, opened said ceded lands to settlement, on and after the 25th day of July, 1895, under the terms of and subject to all the conditions, limitations, reservations and restrictions contained in said agreement, the statute hereinbefore mentioned and referred to and the laws of the United States applicable thereto.

III.

That thereafter on the 17th day of May, 1900, the Congress of the United States, duly and regularly passed and adopted an act entitled,

“An Act providing for free homesteads on the public lands by actual bona fide settlers, and reserving the public lands for that purpose,”

in and by which said act it was provided that all settlers, under the homestead laws of the United States upon the public lands which have already been opened to settlement, acquired prior to the passage of said act by authority or agreement from the various Indian tribes, who have resided or who shall hereafter reside upon the tract entered in good faith, for the period required by the existing law, shall be entitled to a patent for the land so entered, upon the payment to the local land officers of the usual and customary fees and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent to the lands covered by his entry.

IV.

That on or about August, 1900, the defendant, Willard N. Jones, with a view to and the intention of acquiring title in himself and persons associated and interested with him, to the lands hereinafter described, together with a large quantity of other lands ceded and opened to settlement under the homestead laws as hereinbefore set forth, caused a large tract thereof, including the lands hereinafter described, to be cruised for the purpose of ascertaining the quantity of timber standing thereon, all of said lands being then and there heavily timbered and very valuable for the timber thereon.

V.

That on and between the 15th day of August, 1900, and the 25th day of February, 1901, the said defendant, Willard N. Jones, designing and intending to deceive the officers of the United States having authority relating to and over the public lands of the United States, and to defraud and cheat complainant out of the title, use and possession of a large portion of its unappropriated public lands open to settlement and entry under the homestead laws as aforesaid, by means of soliciting and procuring persons qualified to make homestead entries of said lands, to make false and fraudulent and collusive homestead entries upon portions of said ceded land then unappropriated, did on and between the above men-

tioned dates, solicit and procure the hereinafter named persons, together with a large number of other persons to make in the manner and form prescribed by law, homestead applications and affidavits at the United States Land Office therein at Oregon City, Oregon, but now at Portland, Oregon, for the lands hereinafter specifically described, together with others of said lands.

VI.

That the persons, among others wrongfully and unlawfully solicited and procured by the defendant, Willard N. Jones, to make homestead applications, affidavits and entries as aforesaid, together with the date of the affidavit and application of each to enter the same, the number of the said application and the description of the lands entered and applied for, are as follows:

BENJAMIN S. HUNTER,

Date of Affidavit and Application, October 9, 1900,

Homestead Application No. 13135,

South Half of Northwest Quarter, Southwest Quarter of Northeast Quarter, and Northwest Quarter of Southwest Quarter of Section 13, Township 9 South, Range 10, West Willamette Meridian.

OLIVER I. CONNOR,

Date of Affidavit and Application, October 6, 1900,

Homestead Application No. 13116, for

Southeast Quarter of Northeast Quarter and Northeast Quarter of Southeast Quarter, Section 4, and Southwest Quarter of Northwest Quarter and Lot 4, Section 3, Township 9 South, Range 10 West Willamette Meridian.

WILLIAM TEGHTMEIER,

Date of Affidavit and Application, February 25, 1901,

Homestead Application No. 13396, for

South Half of Northeast Quarter and North Half of Southeast Quarter of Section 10, Township 9 South, Range 10, West Willamette Meridian;

RICHARD D. DEPUE,

Date of Affidavit and Application, October 5, 1900,

Homestead Application No. 13113, for

North Half of Southwest Quarter, Southeast Quarter of Southwest Quarter and Southwest Quarter of Southeast Quarter of Section 3, Township 9 South, Range 10, West Willamette Meridian;

JOSEPH GILLIS,

Date of Affidavit and Application, October 1, 1900,

Homestead Application No. 13088, for

Lots 1, 2, 3 and 4, Section 4, Township 9 South, Range 10 West Willamette Meridian;

THOMAS JOHNSON,

Date of Affidavit and Application, October 1, 1900,
Homestead Application No. 13089, for

West Half of Southwest Quarter, Southeast Quarter of Southwest Quarter of Section 14, and Northeast Quarter of Northwest Quarter of Section 23, Township 9 South, Range 10, West Willamette Meridian;

JOHN L. WELLS,

Date of Affidavit and Application, October 1, 1900,
Homestead Application No. 13090, for

South Half of Southeast Quarter, and Lots 1 and 2 of Section 10, and Northeast Quarter of Northeast Quarter of Section 15, Township 9 South, Range 10, West Willamette Meridian;

EDWARD C. BRIGHAM,

Date of Affidavit and Application, October 9, 1900,
Homestead Application No. 13137, for

Southeast Quarter of Southeast Quarter of Section 14, and South Half of Southwest Quarter and Northeast Quarter of Southwest Quarter of Section 13, Township 9 South, Range 10 West Willamette Meridian;

ANTHONY GANNON,

Date of Affidavit and Application, October 1, 1900,
Homestead Application No. 13087, for

East Half of West Half of Section 11, Township 9 South, Range 10, West Willamette Meridian;

VII.

That all of said lands hereinbefore described and entered and applied for as aforesaid at the United States Land Office at Oregon City, Oregon, were at the time of said applications and entries, vacant, unappropriated, non-mineral, public lands of the United States, subject to homestead entry as hereinbefore set forth, and at the time the said defendant, Willard N. Jones, solicited and procured the said above named persons and each of them to apply for and enter said lands, and before the filing of said applications and entries respectively, under the homestead law, he prevailed upon and induced each of said entrymen to subscribe or assent to a written document or instrument substantially in words and figures as follows:

“That whereas, the party of the first part is entitled to the benefits of the Act of Congress of June 8th, 1872, (Sec. 2304 R. S.) giving homesteads to honorably discharged soldiers and sailors, and desires to avail himself of the privileges therein granted by taking a homestead, and the party of the second part is in possession of information relative to the existence of public lands within the State of Oregon subject to such entry;

Now, therefore, the party of the second part, in consideration of the covenants and agreements on the part of the party of the first part herein-after stipulated to be kept and performed, hereby agrees to give to the party of the first part, information which will enable him to locate and file a homestead upon 160 acres of the public lands of the United States, situated within the State of Oregon, and the party of the first part hereby agrees to pay to the party of the second part as compensation for such services and information, and for his services to be performed in the preparation of the papers and affidavits necessary in making such filing the sum of \$185.00, to be paid in the manner and at the time hereinafter designated.

The party of the first part further agrees to comply with the laws of the United States in regard to residence upon said lands taken as a homestead, and agrees to employ and does hereby employ the party of the second part to build a house upon the land to be taken as a homestead, and agrees to pay to the said party of the second part therefor, the sum of \$100.00 to be paid in the manner and at the time hereinafter designated, and also to clear and cultivate the land to be taken up under this agreement, or so much thereof as is required and for the time required

by the laws of the United States in order to perfect title thereto, and to pay the said party of the second part therefor the sum of \$175.00, to be paid at the time and in the manner hereinafter designated. The said party of the second part hereby accepts such employment, and agrees to do and perform or to cause to do and performed all work and labor necessary to be done and performed upon said premises in order to comply with the laws of the United States.

The party of the second part hereby agrees to advance to the party of the first part, *if required*, the amount of fees required at the land office in order to make and perfect such filing, and all necessary expenses of the party of the first part in connection therewith, not to exceed the sum of \$60.00, and the party of the first part agrees to repay to the party of the second part all sums so advanced at the time and in the manner hereinafter designated.

The party of the second part further agrees that after final proof shall have been made upon said claims, he will, *at the option of the party of the first part*, procure for the party of the first part a loan not to exceed the sum of \$720.00, to be secured by a first mortgage upon said claim, and immediately upon procurement of such loan

all sums of money herein stipulated to be paid to the party of the second part by the party of the first part, together with all sums of money advanced by the party of the second part to the party of the first part under this agreement shall become due and payable, and shall be paid out of the loan so secured; and it is further understood by and between the parties hereto that the payment by the party of the first part to the party of the second part of all sums of money hereinbefore designated shall be conditional upon the procurement by the party of the second part of the loan hereinbefore mentioned, *if the same shall be required.*

In case the party of the first part shall not wish to avail himself of the loan hereinbefore mentioned, then, and in that event, all moneys advanced to the party of the first part by the party of the second part under this agreement, together with all sums of money hereby agreed to be paid to the party of the second part by the party of the first part shall become due and payable as soon as final proof shall have been made upon said claim. And the party of the first part hereby agrees to make said final proof as soon as the laws of the United States have been complied with, '(in regard to residence and cultivation.)'

“Witness our hands the year and day first above written.”

VIII.

That in and by said instrument and document above mentioned, to which he induced and persuaded each of said entrymen to subscribe or assent, the said defendant, Willard N. Jones, intended to conceal his design and intention to acquire title to the lands which were entered and applied for by the said entrymen as aforesaid, and to conceal the fact that it was the intention and purpose as hereinafter set forth, of the said defendant, Willard N. Jones, and said entrymen, to retain the then places of residence of each of said entrymen, and that it was not intended by the said Willard N. Jones or any of said entrymen, to reside upon or make their home upon the lands entered and applied for by them, as required by law, before the issuance of patent thereto; that all of said entrymen at the time of their said applications and entries, resided in Portland, Multnomah County, Oregon, except the entryman Benjamin S. Hunter, who then resided in Dundee, Yamhill County, Oregon, and neither the said Willard N. Jones or any of said entrymen at the time of making said applications and entries, or at any other time, intended to establish a residence upon the lands entered by said entrymen respectively, or to reside thereon; and the said Willard N. Jones at the time of said applications and entries and

each of them, well knew and each of said entrymen well knew, that none of said entrymen intended to establish a residence upon the lands entered or to be entered by them respectively, or to reside thereon during the life of their respective homestead entries.

IX.

That it was further wrongfully and fraudulently intended and designed by the said Willard N. Jones, at and prior to said application and entries aforesaid, and thereafter during the life of the said homestead entries respectively, that each of said entrymen should falsely make proof before the officers of the United States having authority relating to and over the public lands, and in the form prescribed by law to the effect, among other things, that each of said entrymen had established a residence upon the lands entered by him respectively, and had resided continuously thereon for the length of time prescribed by law, and that each of said entrymen had reduced to cultivation and cultivated a substantial portion of said lands, and that they had made substantial improvements thereon, when, in truth and in fact, as the said Willard N. Jones well knew, none of said entrymen would at the time of making said proof, have established a residence upon the lands entered by him, nor resided thereon, and would not have cultivated any part thereof nor have made any improvements thereon.

X.

That thereafter, in order to carry out the said fraudulent intention and design to acquire title to said lands and to procure said entrymen to make false, fraudulent and collusive applications, affidavits, entries and proofs as aforesaid, and pursuant to the fraudulent and collusive understanding and agreement entered into between the said Willard N. Jones and each of said entrymen and applicants, the said Willard N. Jones caused notice to be given as required by law, of the intention of the respective entrymen to make homestead proofs on the lands embraced in their respective entries; that thereafter, each of said entrymen offered and made homestead proof in the form prescribed by law and submitted the same to the officers of the United States land office at Oregon City, Oregon, upon the following dates:

Entrymen	Date of Proof.	Date and No. of	
		Final Certificate	
do and perform or to cause to done and per-			
Benjamin S. Hunter.....	12-23-01	12-23-01	6477
William Teghtmeier.....	5-26-02	5-26-02	6525
Richard D. Depue.....	11-25-01	11-25-01	6457
Joseph Gillis	11- 4-01	11- 4-01	6443
Thomas Johnson	11- 4-01	11- 9-01	6446
John L. Wells.....	5-26-02	5-26-02	7427
Edward C. Brigham.....	12-23-01	12-23-01	6476
Anthony Gannon	11-25-01	11-25-01	6458

That each of said entrymen, in conformity with said notices of intention to make proof above mentioned, and pursuant to their respective intentions to make false, fraudulent and collusive homestead applications, affidavits and entries and proofs thereon as aforesaid, offered and made homestead proof and submitted the same to the officers of the United States Land Office at Oregon City, Oregon, at the dates above set forth; that in and by said homestead proof, each of said entrymen by himself and two witnesses falsely and fraudulently represented that he had as required by law, established a residence upon and resided upon the land embraced in his said entry continuously after the alleged establishment of residence thereon until the time of said proofs, and had made substantial improvements thereon as set forth in said proof; that he had been only temporarily absent from said lands for a short time for the purpose of earning money to improve the same, and those entrymen having families, each further falsely gave proof by himself and witnesses that his family resided on the claim in the absence of the entryman; that he had cultivated that portion of said lands specifically set out in his said proof and that he had not conveyed any part of said lands and had not made any contract directly or indirectly, whereby the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; and that he was acting in good

faith in perfecting the entry, when in truth and in fact, as each of said entrymen and his witnesses then and there well knew at the time of making said proofs, had not established a residence upon said lands and had never resided thereon and had no improvements thereon, and none of the said entrymen as they and their witnesses well knew, had cultivated that part of his said entry set forth in his homestead proof, or any part thereof, for the time set forth in said proof or at any time, but if any part of any of said homestead entries was cultivated, the same was done by the defendant, Willard N. Jones, and all improvements made thereon was made by the defendant, Willard N. Jones, and not by any of said entrymen; and plaintiff alleges that none of said entrymen had acted in good faith or was acting in good faith in perfecting said entry, but was making the same upon speculation and not for the purpose of making or securing for himself or his family, a home; that in truth and in fact, all of said entrymen after the making of their respective entries as aforesaid, continued at all times during the life of their respective entries, to reside at Portland, Oregon, except Benjamin S. Hunter, who resided at all said times at Dundee, Oregon, as aforesaid; that no improvements were made upon any of said lands during the life of said homestead entries, with the exception that the said defendant, Willard N. Jones, for the purpose of falsely and fraudulently making it appear that each of said entrymen resided upon his respective

entry, had a house thereon built, a small, flimsy, uninhabitable shack upon the lands within each of said entries, shortly before said proofs were made;

And the said Willard N. Jones, also in furtherance of said fraudulent and collusive purpose, caused a small tract upon each of said entries, in extent less than an acre, to be scratched over in order to give a semblance of a foundation for the statements of the entrymen and their witnesses that a portion of their respective entries had been cultivated.

XI.

That the defendant, Willard N. Jones, paid to the officers of the United States, all sums of money as fees and otherwise, exacted of the several entrymen above named, and furnished proof witnesses and their expenses, in connection with their said entries, and the same was paid and said proofs made, for the purpose of defrauding the United States out of the lands embraced in said respective entries, and the said Willard N. Jones knowingly induced and procured each of said entrymen to make said false and fraudulent proofs aforesaid and paid all the expenses of each in relation thereto and connected with said entries;

That the land officers of the United States at Oregon City, Oregon, being ignorant of the false and fraudulent representations made by the said entrymen in their respective homestead proofs and having no

means of ascertaining the truth thereof, upon the receipt of said sums of money as fees and upon the purchase price for said lands, the same being furnished and paid by the defendant, Willard N. Jones, and upon the submission of the said proofs, issued certificates to each of said entrymen to the effect that upon presentation thereof to the Commissioner of the General Land Office, the entrymen named therein would be entitled to receive a patent for the land described in his homestead entry; that the dates and numbers of the final certificates so issued are as set forth in paragraph X. hereof:

That shortly after submission of final proof upon said homestead entries as hereinbefore set forth, and the issuance of said final certificates, each of said entrymen executed a mortgage to the defendant, Willard N. Jones and received a sum of money from him in conformity with the instrument to which each of said entrymen subscribed or assented, as set forth in paragraph VII hereof.

XII.

That thereafter, the officers of the United States Land Office at Oregon City, Oregon, transmitted to the General Land Office of the United States, the papers and testimony relating to each of said homestead applications, entries and proofs; and thereafter, notwithstanding the facts hereinbefore mentioned and set forth, the President of the United States and the

officers of the Department of the Interior and the General Land Office of the United States, being ignorant of the false and fraudulent character thereof as above set forth, and having no means of ascertaining the same, did issue to each of said applicants and entrymen, a patent purporting to convey to the respective applicants and entrymen, the land described in their respective applications and entries and upon the dates following:

Entryman.	Date.
Benjamin S. Hunter.....	September 26, 1902
Oliver I. Connor.....	December 30, 1902
William Teghtmeier.....	May 19, 1903
Richard D. Depue.....	December 30, 1902
Joseph Gillis.....	December 30, 1902
Thomas Johnson.....	September 26, 1902
John L. Wells.....	October 12, 1903
Edward C. Brigham.....	June 8, 1903
Anthony Gannon.....	June 8, 1903

XV.

That all of the false and fraudulent representations made by the several entrymen and their witnesses as hereinbefore set forth, were made with the knowledge and at the solicitation of the said defendant, Willard N. Jones, and with the intent to deceive and defraud the United States out of the use of, title to and possession of the lands hereinbefore described, and the complainant relied upon the false and fraudulent representations so

made as aforesaid, and was deceived and defrauded thereby, and by reason of such false and fraudulent representations and unlawful, collusive and corrupt agreement and understanding between said entrymen and the said defendant, plaintiff was wrongfully and unlawfully induced to issue said patents and part with the title to said lands to its damage in the sum of One Hundred Thirty-three Thousand (\$133,000) Dollars.

XVI.

That at the time of the applications and entries of said lands and at the time of the issuance of patents therefor as aforesaid, the lands hereinbefore described were of the reasonable aggregate value of Thirty-one Thousand, Four Hundred (\$31,400.00) Dollars, and said lands are now of the reasonable aggregate value of the sum of One Hundred Thirty-three Thousand (\$133,000.00) Dollars, and by reason of the fraudulent practices and representations, solicited, induced and committed by the said defendant, Willard N. Jones, as aforesaid, and relying upon which, plaintiff was wrongfully induced to issue patents for said lands as hereinbefore alleged, plaintiff was and is damaged in a sum of money equal to the full value of said lands, to-wit, the sum of One Hundred Thirty-three Thousand (\$133,000.00) Dollars, and is entitled to recover the same from the defendant, Willard N. Jones.

WHEREFORE, plaintiff demands judgment

against the defendant for the sum of \$133,000.00, together with its costs and disbursements incurred herein.

JOHN McCOURT,
United States Attorney.

United States of America,

District of Oregon—ss.

I, John McCourt, being first duly sworn, on oath depose and say that I am United States Attorney for the District of Oregon, and that the facts set forth in the foregoing complaint are true as I verily believe. I base this affidavit of verification upon reports and affidavits submitted and presented to me by the agents and officers of the General Land Office of the United States, the agents and officers of the Interior Department of the United States, and the agents and officers of the Department of Justice of the United States, together with the official report of the evidence taken and given in that certain criminal action against the defendant named in the foregoing complaint involving the matters and transactions set forth therein.

JOHN McCOURT.

Subscribed and sworn to before me this 11th day of June, 1912.

(Seal)

FRANK L. BUCK,
Notary Public for Oregon.

Filed June 11, 1912. A. M. Cannon, Clerk.

And Afterwards, to-wit, on the 13th day of March, 1916, there was duly filed in said Court and cause an Amended Answer, in words and figures as follows, to-wit:

AMENDED ANSWER.

Comes now the defendant in the above entitled cause, and by this his amended answer filed by leave of Court first had, answering the complaint of the complainant therein, admits, denies and alleges as follows:

I.

Answering paragraph I of said complaint, this defendant admits the same to be true.

II.

Answering paragraph II of said complaint, this defendant admits the allegations thereof to be true.

III.

Answering paragraph III of said complaint, this defendant admits the allegations thereof to be true.

IV.

Answering paragraph IV of said complaint, this defendant denies that on or about August, 1900, or at any time or at all, this defendant, with a view to or with the intention of acquiring title in himself or acquiring title

in himself and persons or any person associated or interested with him to the lands in said complaint described, or any thereof, or to such lands or any thereof together with a large quantity of or any other lands ceded and open to settlement under the homestead laws of the United States, or otherwise or at all, caused a large tract or any thereof, including the lands in the complaint described, or any thereof, to be cruised for the purpose of ascertaining the quantity of timber standing thereon, or otherwise, or at all, and denies that all of said lands were heavily timbered or very valuable for the timber thereon, but admits that some of said lands were heavily timbered.

V.

Answering paragraph V of said complaint, this defendant denies that on or between the 15th day of August, 1900, and the 25th day of February, 1901, or at any time or at all, this defendant, designing and intending, or designing or intending to deceive the officers of the United States having authority relating to or over the public lands of the United States or any of them, or any such officers, or any person or persons, or to defraud or cheat complainant out of the title, use, or possession of a large or any portion of its unappropriated public lands open to settlement and entry under the homestead laws of the United States, or any land whatsoever, or otherwise or at all, by means of soliciting

or procuring persons qualified or otherwise to make homestead entries on said lands or any thereof to make false or fraudulent or collusive homestead entries upon portions or any of said ceded lands then or at any time unappropriated or otherwise or at all, did, on or between the dates last aforesaid, or at any time or at all, solicit or procure the persons named in the said complaint or in paragraph 6 thereof, or any of them, or any other person or persons, to go with a large or any number of other persons or any other persons, or at all, to make homestead applications or affidavits at the United States Land Office at Oregon City, Oregon, or elsewhere, or at all, for the lands in the complaint described or any thereof, or for such lands or any thereof together with any other land or lands.

VI.

Answering paragraph VI of said complaint, this defendant denies that the persons named in said paragraph were or that any of them was, or that the persons in said paragraph mentioned, among others or with others, or with any person or at all, wrongfully or unlawfully solicited or procured by this defendant to make homestead applications, affidavits, or entries as in the complaint alleged, or otherwise, or at all, or to make such or any homestead applications or application, affidavits or affidavit, entries or entry. This defendant believes that the persons named in said paragraph VI on or about

the dates therein mentioned respectively entered as homesteads under said Act of August 15th, 1894, the tracts of land which it is averred in said paragraph VI they entered under the homestead laws, but this defendant denies that he wrongfully or unlawfully solicited or advised or procured said parties or any of them to make such entries.

VII.

Answering paragraph VII of said complaint, this defendant admits that all of the lands in the complaint described were at the time of the applications and entries in the complaint mentioned vacant, unappropriated, non-mineral, public lands, subject to entry as homesteads under the said Act of August 15th, 1894, but this defendant denies that he solicited or procured said persons mentioned in paragraph VI of said complaint, or any of them or any person or persons, to apply for or enter said lands or any thereof, and denies that before the filing of such applications and entries or any of them, or at any time or at all, this defendant prevailed upon or induced each or any of said entrymen to subscribe or assent to a written document, or to the written document or instrument set forth in paragraph VII of said complaint. This defendant, however, admits that a contract, in substance the same as that set forth in said paragraph VII, was entered into between this defendant and said parties respectively in para-

graph VI of said complaint mentioned, under the circumstances and conditions, however, hereinafter in this answer averred, and not otherwise.

VIII.

Answering paragraph VIII of said complaint, this defendant denies that in and by, or in or by said instrument set forth in paragraph VII aforesaid the defendant intended to conceal his design or intention to, and denies that he ever had any design or intention to acquire title to the lands which were entered and applied for by the said entrymen or any thereof, or intended to conceal the alleged fact, and denies that it was a fact that it was the intention or purpose of this defendant and the said entrymen or of this defendant or any of them that said entrymen or any of them should retain the then places of residence of said entrymen, or that any of them should retain his then place of residence, and denies that it was not intended by the defendant or the said entrymen or any of them that said entrymen or any of them should reside upon or make their or his home upon the lands entered and applied for as required by law before the issuance of patent thereto, and denies that neither this defendant nor any of said entrymen at the time of making said applications and entries, or at any time, intended that said entrymen or any of them should not establish a residence upon the lands entered or to be entered by them respectively or to re-

side thereon during the life of their respective homestead entries. This defendant admits that he did not intend to reside upon any of said tracts, but denies that he had any knowledge or information sufficient to form a belief that any of the said entrymen did not intend to reside upon the tract of land entered by him as required by law.

IX.

Answering paragraph IX of said complaint, this defendant denies that it was further or at all wrongfully or fraudulently intended or otherwise or at all intended or designed by defendant, at or prior to said applications and entries or any thereof or during the life of said homestead entries respectively or any thereof, or at, during or for any time whatever, or at all, that each or any of said entrymen should falsely make proof before the officers of the United States or any thereof having authority relating to or over the public lands, or otherwise, or in the form prescribed by law, or in any form, or at all, that each or any of said entrymen had established a residence upon the lands entered by him respectively or had resided continuously thereon for the length of time prescribed by law or for any time, or that each of said entrymen or any of them had reduced to cultivation or cultivated a substantial portion of said lands or that they or any of them had made substantial improvements thereon, or should make any false proof

or representations respecting said entries whatsoever at any time, and denies that in truth or in fact this defendant well or at all knew at any time that none of said entrymen would at the time of making final proof have established a residence upon the lands entered by him, or knew that in truth or in fact none of said entrymen had resided thereon or would have resided thereon or would not have cultivated any part thereof nor made any improvements thereon; and denies that this defendant ever at any time contemplated, designed, or intended that any of said entrymen should fail or neglect to or would or should not make the required residence, settlement and cultivation on the lands by them respectively entered, or would by any means or in any manner or by any proof falsely or fraudulently represent that they had made the required settlement, residence or improvements when in truth they had not.

X.

Answering paragraph X of said complaint, this defendant denies that in order to carry out said alleged or any fraudulent intention or design to acquire said lands or to acquire title thereto, or to any thereof, or to procure said entrymen or any of them to make false or fraudulent or collusive applications, affidavits, entries or proofs as alleged in said complaint, or otherwise, or pursuant to the alleged fraudulent or collusive, or any fraudulent or collusive understanding or agreement al-

leged in said complaint to have been entered into between this defendant and each or any of said entrymen and applicants or otherwise, or for any fraudulent or wrongful or improper reason, design, motive or purpose whatsoever, or at all, this defendant caused notice to be given as required by law or otherwise of the intention of the respective entrymen to make homestead proofs on the lands embraced in their respective entries, or on any thereof. This defendant is informed that it is true that each of said entrymen made homestead proof in the form prescribed by law and submitted the same to the officers of the United States Land Office at Oregon City, Oregon, on or about the dates alleged in said paragraph X of said complaint. This defendant denies, however, that said entrymen or any of them, pursuant to any intention or intentions to make false or fraudulent or collusive homestead application, affidavit, entry, or proof, offered or made homestead proof or submitted the same to the officers of the United States Land Office at Oregon City, Oregon, or elsewhere, at the dates or any date in said complaint alleged, or at any time or otherwise, or at all. As to whether or not in truth or in fact in or by said alleged homestead proof on any homestead, each of said entrymen, or any of said entrymen, either by himself or by or with two or any number of witnesses, or at all, falsely or fraudulently represented that he had as required by law established a residence upon or resided upon the land embraced in his

said entry continuously after the alleged establishment of residence thereon until the date of said proof, or had made substantial improvements thereon as set forth in said proofs or any thereof, or that he had been only temporarily absent from said lands or any thereof for a short time for the purpose of earning money to improve the same; or as to whether or not said entrymen having families, or any entryman having a family, or otherwise, falsely gave proof by himself and witnesses, or otherwise, or at all, that his family resided on the claim in the absence of the entryman or that he had cultivated that portion of said lands specifically set out in said proof or any thereof, or that he had not conveyed any part of said lands or had not made any contract, directly or indirectly, whereby the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself, or that he was acting in good faith in perfecting the entry when in truth or in fact said entrymen or any of them, or the witnesses or witness of any of them then or there well or at all knew at the time of making said proofs or any thereof that said entrymen or any thereof had not established a residence upon said lands or any thereof or had never resided thereon or had no improvements thereon; or as to whether or not none of said entrymen had not, or knew, or their witnesses or any of them knew or well knew or at all knew said entrymen had not or any of them had not cultivated that

part of his said entry set forth in his homestead proof or any part thereof for the time set forth in said proof or at any time, this defendant denies that he has any knowledge or information sufficient to form a belief, and therefore denies the said allegations and each and every thereof. This defendant denies that if any, or whatever part of said homestead entries was cultivated, the same was done by this defendant, and denies that all or any of the improvements made thereon were made, or any improvement thereon or on any of said lands was made by this defendant, and denies that the improvements on said lands or any thereof were not made by said entrymen; but avers on the contrary that all improvements made on said lands were made by said entrymen and that each entryman made all of the improvements on the land by him entered, and, as defendant believes, made all improvements required by law. This defendant denies that none of said entrymen acted in good faith or was acting in good faith in perfecting his said entry and denies that in making such proofs or making such entries said entrymen or any of them made the same upon speculation and not for the purpose of making or securing for himself and family a home. Denies that in truth or in fact all or any of said entrymen, after making their respective entries as aforesaid, continued at all times or at any time during the life of their respective entries to reside at Portland, Oregon, excepting the said entryman Benjamin S. Hunter, and

denies that during such time said Hunter resided at all times, or any time, or at all, at Dundee, Oregon, or elsewhere than on the land so entered by him. Denies that no improvements were made upon any of said lands during the life of said homestead entries and denies that this defendant for the purpose of falsely or fraudulently making it appear that each of said entrymen or any thereof had resided upon his respective entry or otherwise, had a house built thereon, or a small, flimsy, or uninhabitable, or other shack of house built upon lands within each of said entries, or any thereof, shortly before said proofs or any thereof were made, or at any time or at all. Denies that this defendant in furtherance of said alleged fraudulent and collusive purpose, or otherwise, or at all, caused a small tract or any tract upon each or any of said entries, in extent less than an acre, or otherwise, to be scratched over in order to give a semblance of a foundation for the statements of the entrymen or any of them or their witnesses or any witness, or otherwise, or at all, that a portion of their respective entries had been cultivated.

XI.

Answering paragraph XI of said complaint, this defendant denies that he paid to the officers of the United States or any of them all or any of the sums of money as fees or otherwise exacted of the several entrymen in the complaint mentioned, or any of them,

and denies that he furnished proof witnesses or any proof witness or provided or paid the expenses of proof witnesses or any thereof in connection with the said entries or any thereof. Denies that said alleged payments or any thereof were made or that said proofs or any thereof were made for the purpose of defrauding the United States out of the lands embraced in said respective entries or any thereof, or any land whatever, and the defendant denies that he knowingly or otherwise, or at all, induced or procured each or any of said entrymen to make said alleged or any false or fraudulent or any proofs, or paid the expenses of each or any entryman or witness in relation thereto or connected with said or any of said entries. This defendant believes it is true, and therefore he does not deny that the land officers of the United States at Oregon City issued certificates to each of said entrymen to the effect that upon presentation thereof to the Commissioner of the General Land Office the entryman therein named would be entitled to receive a patent to the land described in his homestead entry; and this defendant does not deny that the said land officers of the United States at Oregon City, Oregon, were ignorant of any false or fraudulent representations made by the entrymen aforesaid in their respective homestead proofs, but this defendant denies that any false or fraudulent representations were made by said entrymen in respect of their homestead proofs. This defendant admits that shortly

after the issuance of the final certificates each of said entrymen executed to this defendant a mortgage as hereinafter more particularly set forth and described, but not otherwise, and for money advanced as hereinafter more particularly explained and alleged, and not otherwise.

XII.

Answering paragraph XII of said complaint, this defendant is informed and believes, and therefore admits it to be a fact, that after final proofs had been made and submitted in respect of the entries in the complaint mentioned, the officers of the United States Land Office at Oregon City, Oregon, transmitted the papers and testimony relating to each of said homestead applications to the General Land Office of the United States, and that thereafter the President of the United States and the officers of the Department of the Interior and the General Land Office did issue to each of said applicants and entrymen a patent purporting to convey to the respective applicants and entrymen the land described in their respective applications and entries and upon the dates mentioned in said paragraph XII; but this defendant denies that such patents were issued notwithstanding the alleged facts and alleged frauds and alleged false representations and testimony in the complaint averred or any thereof, and denies that the President of the United States and the officers of the Depart-

ment of the Interior and of the General Land Office of the United States or any of them, being ignorant of the alleged false and fraudulent character of said papers and testimony, issued said patents or caused the same to be issued, but on the contrary, this defendant denies that there was any false or fraudulent proofs, entries or papers submitted to said officers or any of them.

XIII.

Answering the thirteenth paragraph of said complaint (designated therein as paragraph XV), this defendant denies that all or any of the alleged false or fraudulent representations made by the several entrymen or any of them, or made by said entrymen and their witnesses or any of them, or any witness or person, or any false or fraudulent representations in the said complaint averred, were made with the knowledge or at the solicitation of this defendant or made with the intent to deceive or defraud the United States out of the use of or title to or possession of the lands or any of the lands in the complaint described, and denies that the complainant relied upon the alleged or any of the false and fraudulent, or false or fraudulent, or any false or fraudulent representation alleged in the complaint to have been made, or was deceived or defrauded thereby, and denies that by reason of such alleged false and fraudulent representations or of any false or fraudulent representation or unlawful, collusive, or corrupt agree-

ment or understanding between said entrymen or any of them and this defendant, plaintiff was wrongfully or unlawfully induced to issue said patents or any thereof, or part with the title to said lands or any thereof, to its damage in the sum of \$133,000.00, or in any sum or amount whatever.

XIV.

Answering paragraph XIV of said complaint (designated therein as paragraph XVI), this defendant denies that at the time of the applications and entries or applications or entries on said lands or any thereof, or at the time of the issuance of patents therefor or for any thereof, the lands in the complaint described were of the reasonable, aggregate value of \$31,400.00, or any other sum or amount whatever save and except that each tract of land entered was worth the amount of the fees required to be paid to the officers of the United States in making and perfecting a homestead entry therefor, and denies that said lands are now of the reasonable, aggregate value of the sum of \$133,000.00, or any other greater sum than \$., and denies that by reason of the alleged fraudulent practices and representations or of any fraudulent practice or representation, solicited, induced or committed by this defendant, as in the complaint alleged, or otherwise, or at all, or relying upon which the plaintiff was wrongfully induced to issue patents for said lands or any thereof, and

denies that plaintiff was thereby or by reason of any act or thing alleged in the complaint, or otherwise, or at all, damaged in a sum of money equal to the full value of said lands or in any sum or amount whatever, or in the sum of \$133,000.00, or any sum or amount whatever, or is entitled to recover the same or any amount whatsoever from this defendant.

And this defendant, for **A FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE**, avers:

I.

That heretofore, some time in the year 1900, the lands described in the complaint and other lands in the vicinity thereof being open for entry under the homestead laws of the United States, and being largely timbered lands, this defendant did cause said lands and others to be cruised for the purpose of ascertaining approximately the amount of timber on the several legal subdivisions and for the purpose of ascertaining the nature and character of each legal subdivision, to the end that this defendant might engage in the business of locating thereon qualified persons under the homestead laws who desired to enter land subject to entry under such laws. The plan adopted by this defendant is substantially set forth in the form of contract set out in paragraph VII of the complaint in the above entitled cause. That at different times, and prior to making

their respective entries, this defendant entered into a contract with the several parties mentioned and named in paragraph VI of said complaint, which contract in each instance was in substantially the form of the form of contract set forth in paragraph VII of said complaint aforesaid. That in each instance it was the desire, purpose and intention of this defendant that said parties respectively and each party or person with whom he contracted as aforesaid should in all respects comply with the homestead laws of the United States, and the purpose and object of this defendant in entering into such contracts was to earn the fee charged for locating the entrymen. That in each instance this defendant complied strictly with the terms of the agreement entered into between him and the entryman, and in each instance this defendant avers that he believed at the time proof was made that each entryman had faithfully and honestly complied with the homestead laws of the United States in the matter of making settlement, cultivation, improvements, and proof under the homestead laws of the United States, and after making the required settlement, cultivation, improvements and proofs, the entrymen executed to this defendant in each case a mortgage on the land entered to secure to this defendant the payment of the amount by him advanced under such contract, the same being the mortgage in the complaint mentioned and referred to. That in all said matters and transactions and in every matter connected

with said entries this defendant acted in good faith and without any intention or purpose to cheat, defraud, or deceive the complainant.

For a **SECOND FURTHER AND SEPARATE ANSWER AND DEFENSE** to this action, this defendant avers:

That the cause of action in the complaint alleged accrued more than six years next prior to the date of filing the said complaint in this action, and did not accrue at any time within the six years next before the commencement of this action.

And this defendant for a **THIRD FURTHER AND SEPARATE ANSWER AND DEFENSE**, avers:

I.

That the several tracts of land in the complaint described as having been respectively entered by the entrymen mentioned in said complaint, were at the time the same were entered subject to entry as homesteads under and pursuant to the Act of Congress of August 15th, 1894, and each of said tracts of land was entered as a homestead at the time and by the person alleged in the said complaint, under said Act of Congress, and not otherwise, except that the said entrymen did not pay the sum of \$1.50 per acre, or any sum per acre, for said lands so entered, or any thereof, (except that said

entryman Wells paid for commutation as hereinafter averred), because of the Act of Congress of May 17th, 1900, referred to in paragraph III of said complaint. This defendant further alleges that the said Act of August 15th, 1894, among other things, required and provided that as a condition precedent to acquiring title to any such lands, under the homestead laws, an entryman should actually reside on and cultivate the lands so entered for the period of three years, and that such actual residence should be established by the testimony of two witnesses in addition to the testimony of the entrymen.

II.

That the entrymen named in the said complaint, namely, Benjamin S. Hunter, Oliver I. Conner, William Teghtmeier, Richard P. Depue, Joseph Gillis, Thomas Johnson, Edward C. Brigham, and Anthony Gannon, respectively entered the respective tracts of land in the complaint described and averred to have been by them respectively entered, under the said Act of August 15th, 1894, and on the dates in the said complaint alleged. That none of the said entrymen last named, either by himself or by his final or homestead proof witnesses, or any witness produced by him, or otherwise, when he made his homestead or final proof, or at any time, claimed, represented or testified in making such proof, or any proof, or otherwise, that he had

resided upon the said land by him entered for a period of three years or for any other or greater period than as follows: That is to say, the said Edward C. Brigham and his final proof witnesses stated and testified that he, the said Edward C. Brigham, first established a residence on the land by him entered as aforesaid in October, 1900, and his homestead or final proof, and the only proof made and submitted by him, was made and submitted on December 23d, 1901. That the said Anthony Gannon made final or homestead proof, and the only proof made by him under his said homestead entry, on the 25th day of November, 1901, and in making such proof stated and testified, as did his final proof witnesses, that he went upon and made settlement and first acquired a residence on the said tract by him entered October 1st, 1900. That the said Joseph Gillis made and submitted final or homestead proof under his entry aforesaid, and the only proof made by him under said entry, on the 4th day of November, 1901, and in making said final proof testified, as did also his final proof witnesses, that he first established his residence on the land so entered by him on the 1st day of October, 1900. That the said Oliver I. Conner made his homestead or final proof, and the only proof made by him under his said homestead entry, on the 4th day of November, 1901, and in making such proof testified and represented that he had first made and established actual residence on the

land so entered by him on the 26th day of September, 1900. That the said Benjamin S. Hunter made and submitted the homestead or final proof, and the only proof made by him under his said homestead entry, on the 23d day of December, 1901, and in making such proof testified and represented, as did also his final proof witnesses, that he had first made and established actual residence on the land so by him entered in September, 1900. That said Richard P. Depue made and submitted final proof, and the only proof made by him under his entry, on November 25th, 1901, and in making such final proof testified, as did his final proof witnesses, that he first established actual residence on the land so by him entered September 24th, 1900. That said Thomas Johnson made and submitted homestead or final proof, and the only proof made by him under his said entry, on the 9th day of November, 1901, and in making such proof testified and stated, as did his final proof witnesses, that he had first established a residence on the land so by him entered on September 26th, 1900. That said William Teghtmeier made and submitted final proof, and the only proof made by him under his said entry, on the 26th day of May, 1902, and in making such final proof testified and stated, as did his final proof witnesses, that he first established an actual residence on the land so by him entered in September, 1900.

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III.

That each of the said entrymen mentioned in the last above paragraph of this answer, in making his homestead or final proof also made proof of the fact that he had served in the Army or Navy of the United States for periods as follows:

Benjamin S. Hunter enlisted January 4, 1864; discharged December 16, 1865;

Oliver I. Conner enlisted May 2, 1862; discharged May 2, 1865;

William Teghtmeier enlisted June 1, 1861; discharged July 20, 1864;

Richard D. Depue enlisted January 14, 1864; discharged December 18, 1865;

Joseph Gillis enlisted August 2, 1862; discharged June 10, 1865;

Thomas Johnson enlisted November 13, 1861; discharged February 10, 1864;

John L. Wells enlisted September 4, 1864; discharged June 10, 1865;

Edward C. Brigham enlisted August 9, 1862; discharged June 4, 1865; and

Anthony Gannon enlisted September 19, 1861; discharged October 5, 1864;

and had been honorably discharged, and claimed credit under the provisions of sections 2304 and 2305, U. S. R. S. for such military service in lieu of residence on the land by him entered as aforesaid, to the extent of the difference between the period of residence shown by his proof submitted and the full term of three years aforesaid, which claim was in each case considered and allowed by plaintiff in lieu of such portion of the actual residence of three years by law required under said Act of August 15, 1894.

IV.

That the plaintiff and its agents and officers, in considering and passing on said final proofs, well knew that each of said entrymen and his final proof witnesses had therein testified, stated and claimed less than two years actual residence on the part of such entryman, and neither the said plaintiff nor any of its agents or officers in considering said final proofs believed or understood, or had any reason to believe or understand, that any of said entrymen had represented or claimed to have resided upon said lands or any thereof for three years, but on the contrary the plaintiff and each and all of its agents and officers, by mistake of law, gave and allowed to each of said entrymen credit for military service as aforesaid, as a major part of the three years actual residence required by law, and by reason of such mistake of

law, and not otherwise, issued the final certificates and patents mentioned and referred to in the complaint.

V.

Defendant further alleges that the said entryman John L. Wells, referred to in the complaint of the plaintiff herein, in making the homestead or final proof mentioned in Paragraph X of said complaint, claimed and availed himself of the benefit of the Act of Congress of January 26th, 1901, entitled "An Act to allow the commutation of homestead entries in certain cases," under and by the terms of which act a person making homesteadstead was authorized to make homestead commutation proof under the provisions of Section 2301, Revised Statutes of the United States.

VI.

That under and by virtue of the Act of August 15th, 1894, and said Section 2301, the said entryman John L. Wells was required by law in making such homestead commutation proof to establish and show that he had actually resided upon the land so entered by him for a period of at least fourteen months.

VII.

That the said entryman Wells made such homestead commutation proof on the 26th day of May, 1902, and in making such proof testified as follows:

"Q. When was your house built on the land,

and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof).

“A. In August or September, 1900—August, 1900—log cabin 14x16, shingle roof—2 acres cleared—some apple trees—considerable of a roadway cut—2 acres fenced—about \$300.00.

“Q. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried state the fact).

“A. I was unmarried when I filed. I have been married a little over a year and my wife has been with me on the land since then.

“Q. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if been previously absent did your family reside upon and cultivate the land during such absence?

“A. Temporary absence about 4 months—when I was absent my wife was with me.

“Q. How much time since entry have you actually lived upon the land?

“A. Between the time of entry, viz., October 1, 1900, and the present time I have been there

five times, remaining there each time from one to two weeks."

VIII.

And this defendant avers that by the answers and representations aforesaid the said entryman Wells notified and advised the plaintiff that he had not actually resided upon said land to exceed ten weeks prior to the date of making such proof, which proof is the homestead proof referred to in the plaintiff's complaint. And defendant further avers that the said plaintiff and its officers and agents, in considering said final proof and in issuing the final certificate and patent referred to in the complaint to the said Wells, fully and well knew and understood that said Wells had not resided upon said land to exceed ten weeks, and so knowing and understanding, the said plaintiff issued such certificate and the patent to said Wells in the complaint mentioned.

For a **FOURTH FURTHER AND SEPARATE ANSWER AND DEFENSE**, this defendant avers:

I.

That each of the entrymen mentioned and referred to in Paragraph II of the Third Further and Separate Answer herein, in making and submitting his final homestead proof in the complaint mentioned and referred to, personally and each of his final proof witnesses testified, stated and advised the plaintiff, its agents and officers,

that he, the said entryman, had not resided upon the land by him entered as in the complaint described, or any thereof, prior to the making of his homestead or final proof in the complaint mentioned, for the period of three years, nor for any greater period than from one to one and one-half years. That the plaintiff and its officers and agents, in considering said homestead or final proofs and in issuing the final certificates and patents in the complaint mentioned, well knew and understood that each of said entrymen had not resided upon the land by him entered in the complaint mentioned for three years prior to the making of the homestead or final proof in the complaint mentioned, nor for any greater period of time than from one to one and one-half years, but notwithstanding said knowledge and understanding, the plaintiff, its agents and officers, by mistake of law, erroneously issued said certificates and patents in the complaint mentioned.

II.

That the said entryman Wells, in making his homestead or final proof in the complaint mentioned, testified and stated and advised the plaintiff, its agents and officers, that he had not actually resided upon said land prior to the making of said homestead or final proof for a total period of more than ten weeks, and the said plaintiff, its agents and officers, in considering said final proof, well understood and knew that he, the said Wells,

had not resided on said land as aforesaid for a period of more than ten weeks, but notwithstanding such knowledge the plaintiff, its agents and officers, by mistake of law, and not otherwise, erroneously issued said certificates and patents in the complaint mentioned. That said Wells paid plaintiff for the tract, consisting of 160 acres, entered by him, in the complaint mentioned, the sum of \$240.00, the full minimum price and value thereof, prior to the issuance of the patent therefor, in the complaint mentioned.

III.

That prior to the commencement of this action the said tracts of land in the complaint described as having been entered by and patented to the said entrymen Edward C. Brigham, Thomas Johnson, William Teghtmeier, and John L. Wells, were, for the full market value thereof, sold and conveyed to and purchased by, and are now owned and held by Chautauqua Lumber Company, a corporation; and the tracts in said complaint described as having been entered by and patented to said entrymen Anthony Gannon, Joseph Gillis, Oliver I. Conner, Benjamin S. Hunter, and Richard D. Depue, were, for the full market value thereof, paid by the purchaser, granted, bargained, sold and conveyed to, and are now owned and held by Sunset Timber Company, a corporation of the State of Oregon. That said Chautauqua Lumber Company and said Sunset Timber Com-

pany, hereinafter referred to as purchasers, each purchased the land so conveyed to it in good faith without any knowledge, notice, information or belief that the plaintiff claimed any interest therein, or in or to any thereof, or that there was any defect in the title thereto or to any thereof, and each of said purchasers in purchasing said lands so to it conveyed, acted in good faith in all respects and without any knowledge, information, belief or notice whatsoever of the alleged frauds and deceits, or frauds or deceits, or any thereof in the complaint alleged, and each of said purchasers paid for each tract of the lands aforesaid to it conveyed the full market value thereof at the time of purchasing the same.

IV.

And this defendant avers that by reason of the premises, even if it shall be adjudged that the plaintiff is entitled to recover any sum in this action, it cannot have or recover a sum exceeding the Government minimum price of said lands by statute provided, namely, the sum of \$1.50 per acre.

WHEREFORE, this defendant demands judgment that this action be dismissed and that he have and recover his costs and disbursements herein.

FULTON & BOWERMAN,

SCHWARTZ & SAUNDERS,

Attorneys for Defendant.

State of Oregon,

County of Multnomah—ss.

I, Willard N. Jones, being first duly sworn, depose and say, that I am the defendant in the above entitled cause and that the above and foregoing amended answer is true as I verily believe.

WILLARD N. JONES.

Subscribed and sworn to before me this 10th day of March, 1916.

C. W. FULTON,

Notary Public for the State of Oregon.

My commission expires July 10th, 1916.

State of Oregon,

County of Multnomah—ss.

Due service of the within Amended Answer by the delivery of a duly certified copy thereof as provided by law, at Portland, Oregon, on this 9th day of March, 1916, is hereby admitted.

E. A. JOHNSON,

Of Attorneys for Complainant.

Filed March 13, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 15th day of March, 1916, there was duly filed in said Court and cause a Demurrer to Amended Answer, in words and figures as follows, to wit:

DEMURRER TO AMENDED ANSWER.

Comes now the plaintiff above named, by E. A. Johnson, Assistant United States Attorney for the District of Oregon, and demurs to the second further and separate amended answer and defense of the defendant heretofore on March 13, 1916, filed in the above entitled court and cause, for the reason that the facts therein alleged are insufficient in law to constitute a defense to the complaint of plaintiff.

And demurs to the third further and separate amended answer and defense of the defendant heretofore on March 13, 1916, filed in the above entitled court and cause, for the reason that the facts therein alleged are insufficient in law to constitute a defense to the complaint of plaintiff:

And demurs to the fourth further and separate amended answer and defense of the defendant heretofore on March 13, 1916, filed in the above entitled court and cause, for the reason that the facts therein alleged are insufficient in law to constitute a defense to the complaint of plaintiff.

Dated at Portland, Oregon, this 15th day of March, 1916.

E. A. JOHNSON,

Assistant United States Attorney.

United States of America,

District of Oregon—ss.

Due, timely and legal service of the within demurrer by receipt by me of certified copy thereof is hereby admitted at Portland, Oregon, this 15th day of March, 1916.

C. W. FULTON,

Of Attorneys for Willard N. Jones, Defendant.

Filed March 15, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Friday, the 31st day of March, 1916, the same being the 23rd judicial day of the regular March, 1916, term of said Court; present, the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER ON DEMURRER.

This cause was heard upon the demurrer of the plaintiff to the second, third and fourth separate and further defenses pleaded in the amended answer filed by said defendant, and was argued by Mr. Everett A. Johnson, Assistant United States Attorney, and by Mr. C. W. Fulton and Mr. H. H. Schwartz, of counsel for said defendant.

ON CONSIDERATION whereof it is ORDERED and ADJUDGED that said demurrer be, and the same is hereby overruled, as to the third and fourth defenses and sustained as to the second defense.

And afterwards, to wit, on the 31st day of March, 1916, there was duly filed in said Court and cause an Opinion on Demurrer to Amended Answer, in words and figures as follows, to wit:

OPINION.

This is an action to recover damages, based upon fraud and deceit.

By an act of August 15, 1894 (28 Stat. 286, 326), provision was made for disposition of certain ceded lands formerly a part of the Siletz Reservation, in language following:

“The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the townsite law and under the provisions of the homestead law. Provided, however, that each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years’ actual residence on the land shall be established by such evidence as is now required in

homestead proofs as a prerequisite to title or patent."

Subsequently, by act of May 17, 1900 (31 Stat. 179), the Congress provided in effect that, upon payment to the local land officers of the usual and customary fees, no other or further charge of any kind whatsoever should be required from such settler to entitle him to a patent to the lands covered by his entry. This was designed as an amendment of the act of August 15, 1894, and relieved the entryman from payment of \$1.50 per acre as a prerequisite to obtaining his patent from the Government.

In general, the complaint avers that the defendant Jones, with the view of acquiring title in himself and persons associated with him to lands subject to disposition under the act of August 15, 1894, entered into fraudulent arrangements with certain persons, nine in number, whereby each of such persons should make application to homestead a certain tract of the lands subject to entry under said act, and that each should make fraudulent and false proofs as to settlement, residence, improvements, cultivation, etc., at the time of making final proofs so as to entitle him to patent; that said persons accordingly pretended to make settlement upon the lands selected as their homesteads, and offered and made homestead proofs, and submitted the same to the proper officers of the United States Land

Office at Oregon City, "that in and by said homestead proof, each of said entrymen by himself and two witnesses falsely and fraudulently represented that he had as required by law, established a residence upon and resided upon the land embraced in his said entry continuously after the alleged establishment of residence thereon until the time of said proofs, and had made substantial improvements thereon as set forth in said proof; that he had been only temporarily absent from said lands for a short time for the purpose of earning money to improve the same, and those entrymen having families, each further falsely gave proof by himself and witnesses that his family resided on the claim in the absence of the entryman; that he had cultivated that portion of said lands specifically set out in his said proof and that he had not conveyed any part of said lands and had not made any contract directly or indirectly whereby the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; and that he was acting in good faith in perfecting the entry, when in truth and in fact, as each of said entrymen and his witnesses then and there well knew at the time of making said proofs, had not established a residence upon said lands and had never resided thereon and had no improvements thereon, and none of the said entrymen as they and their witnesses well knew, had cultivated that part of his said entry set forth in his homestead proof, or any part thereof,

for the time set forth in said proof or at any time, but if any part of any of said homestead entries was cultivated, the same was done by the defendant, Willard N. Jones, and all improvement made thereon was made by the defendant, Willard N. Jones, and not by any of said entrymen; and plaintiff alleges that none of said entrymen had acted in good faith or was acting in good faith in perfecting said entry, but was making the same upon speculation and not for the purpose of making or securing for himself or his family, a home; that in truth and in fact, all of said entrymen, after the making of their respective entries as aforesaid, continued at all times during the life of their respective entries, to reside at Portland, Oregon, except Benjamin S. Hunter, who resided at all said times at Dundee, Oregon, as aforesaid; that no improvements were made upon any of said lands during the life of said homestead entries, with the exception that the said defendant, Willard N. Jones, for the purpose of falsely and fraudulently making it appear that each of said entrymen resided upon his respective entry, had a house thereon built, a small, flimsy, uninhabitable shack upon the lands within each of said entries, shortly before said proofs were made; and the said Willard N. Jones, also in furtherance of said fraudulent and collusive purpose, caused a small tract upon each of said entries, in extent less than an acre, to be scratched over in order to give a semblance of a foundation for the statements of the entrymen and their witnesses that a

portion of their respective entries had been cultivated.”

By further averment it appears that, relying upon the false and fraudulent representations thus made by the entrymen, the officers of the Government were induced to issue final certificates to them, and eventually patents covering the lands comprised by the homesteads thus entered.

The prayer is for damages in the sum of \$133,000.

The defendant, for a second further and separate answer, has set up the statute of limitations of six years.

For a third further and separate answer, it is averred in effect that, as to eight of the entrymen, none of them, either by himself or by his final or homestead proof witnesses, or any witness produced by him, claimed, represented, or testified that he had resided upon said land by him entered for a period of three years, or for any other or greater period than as set out at length; the proofs showing that length of residence ranged from 13 to 20 months after entry, supplemented by proof of service in the Army or Navy of the United States for the remaining period of the three years. Thereupon it is alleged:

“That the plaintiff and its agents and officers, in considering and passing on said final proofs, well knew that each of said entrymen and his final proof witnesses had therein testified, stated and claimed less than two

years' actual residence on the part of such entryman, and neither the said plaintiff nor any of its agents or officers in considering said final proofs believed or understood, or had any reason to believe or understand, that any of said entrymen had represented or claimed to have resided upon said lands or any thereof for three years, but on the contrary the plaintiff and each and all of its agents and officers, by mistake of law, gave and allowed to each of said entrymen credit for military service as aforesaid, as a major part of the three years' actual residence required by law, and by reason of such mistake of law, and not otherwise, issued the final certificates and patents mentioned and referred to in the complaint."

As to Wells, the remaining one of the nine entrymen, it is alleged that he commuted, but that his proofs show on their face that he was not an actual resident on his pretended homestead to exceed 10 weeks. And in this relation defendant further avers, in effect, that the plaintiff and its officers and agents, in considering said final proof and in issuing the final certificate and patent referred to in the complaint to the said Wells, fully and well knew and understood that Wells had not resided upon said land to exceed ten weeks, and notwithstanding this knowledge and understanding, issued such certificate and patent to Wells.

A fourth further and separate answer is interposed which relates wholly to the measure of damages that should be applied if recovery be had.

The plaintiff demurred to each of these three further and separate answers, on the ground that the facts stated are insufficient in law to constitute a defense.

Wolverton, District Judge:

As the second further and separate answer, the demurrer must be sustained, for the reason that the same question has been previously decided adversely to defendant in this cause. *United States v. Jones*, 218 Fed. 973.

The vital question presented by the third further and separate answer is whether a cause for deceit will lie where the alleged deceit practiced is concerning a matter not material to the subject of negotiation.

The situation in brief is this: Under the general homestead act and other provisions of law having relation to specific territory or localities, and by virtue of sections 2304-2305 R. S., and the act of January 26, 1901 (31 Stat. 740) relating to the commutation of homestead entries in certain cases, honorably discharged soldiers who have made homestead entries are entitled to have the time of their military service deducted from the time of residence and cultivation required to entitle the homesteader to patent; one year's residence being required notwithstanding military service. To illustrate, the time of residence under the general homestead law being five years, if an honorably discharged soldier had performed military service for three years, he would be

entitled to have the time of that service deducted from the five years, and would be entitled to patent after having resided upon his homestead for the period of two years. Now, this regulation was applied by the Government as to eight of the persons alleged to have made false and fraudulent final proofs respecting their homesteads. The proofs were of residence of from 13 to 20 months, and of military service to supplement the same to make out three years' residence on the land, as required by the act of August 15, 1894. The final receipts were all issued prior to the expiration of the three years subsequent to entry upon the lands.

Properly construed, the act of August 15th does not admit of any such application. This is conceded, and the Interior Department has so construed the act as applied to the Siletz Indian Reservation lands. See letter of Assistant Commissioner to Register and Receiver, Oregon City, Oregon, of date July 2, 1902, In re Hattie C. Allebach, H. E. No. 12949.

The act of August 15, 1894, as it applies to the Siletz Reservation lands, requires that three years' actual residence on the land shall be established "by such evidence as is now required in homestead proofs," as a prerequisite to title or patent. This means actual residence for the term, not for a portion thereof supplemented by time of military or other service, and manifestly it should have been required of these eight homesteaders before

final certificates were issued or patents granted to the lands comprised by their homesteads. In issuing the certificates and granting the patents, the Land Department acted under a clear mistake of law, and, even if it be conceded that the proofs submitted were true in every respect, and made in entire good faith, the entrymen were not entitled to title to the lands or to the patents.

Now, having gotten their patents on false proofs, which proofs, if true, would not have entitled them thereto, will the fraud and deceit thus practiced, if it may be so termed, afford grounds upon which the Government may have relief in damages against the participants in the fraud? The proofs made were in no wise material to any inquiry pertinent to the establishment of the entrymen's right to their patents, they were wholly irrelevant to the inquiry that might properly have been made; that is, an inquiry with a view to ascertaining whether three years' actual residence had been made, with cultivation, improvements, etc., as required by the act of August 15, 1894.

The general rule on the subject is tersely stated in *American and English Enc. of Law*, Vol. 14, p. 59, as follows:

“To constitute fraud, a representation must be as to a material fact. With respect to this rule, there is no conflict of opinion, except sometimes in its application. A representation in re-

lation to a fact that is not material to a contract, though it may be false and known to be false by the person making it, and though it may be acted upon by the other party, is not fraud, either for the purpose of an action of deceit, or for the purpose of rescinding the contract.”

Then again, at page 62:

“It has been said that fraud is material to a contract if the contract would probably not have been made if the fraud had not been practiced. This, however, is not always true. If a representation is not material, a person has no right to act upon it, and if he does, he is not entitled to relief or redress on the ground of fraud. The question is not whether the person to whom the representation was made deemed it material, but whether it was in fact material.”

The rule that the false representations must be of a fact material to the contract or inquiry has the approval of the United States Supreme Court. See *Marshall v. Hubbard*, 117 U. S. 415. The Circuit Court in that case instructed the jury, among other things, that “Not only must the representations be made, not only must they be fraudulent, and not only must it appear that the party relied, and had a right to rely, upon them, but it must also be shown that the representations were material to the contract or transaction which took place between the

parties.” Then after so instructing, the court said: “I think, therefore, that upon the proofs the case is within the rule laid down by the Supreme Court of the United States, namely, the court can now see, upon the evidence that bears upon the question of materiality of the representations, and alleged injury to the defendant, that if the jury were to render a verdict against the plaintiff it would have to set that verdict aside.” The court thereupon directed a verdict for the plaintiff, the fraud having been set up by the answer as a defense. On appeal to the Supreme Court, the action of the Circuit Court was affirmed, thus approving the holding of the Circuit Court.

Other cases hold to the same principle, that the false representations must be of a fact material to the contract or transaction to constitute actionable deceit. *Saxby and Wife v. Southern Land Co.*, 109 Va. 196; *Hall v. Johnson*, 41 Mich. 286. In the latter case the court says:

“False representations, no matter how acted upon, will not be sufficient to set aside an agreement otherwise valid unless they were material.”

Missouri Lincoln Trust Company v. Third National Bank of St. Louis, 154 Mo. App. 89;

Furneaux v. Webb, 33 Tex. App. 560;

Anderson v. Adams, 43 Or. 621, 627.

The rule is further extended to comprise alleged

false representations as to a fact of which the opposing party had knowledge, or which was patent to him, or of a fact upon which he had no right to rely. In either of such cases the action of deceit will not lie. *Prince v. Overholder*, 75 Wis. 646 (citing *Slaughter's Adm'r v. Gerson*, 13 Wall. 385).

Robins v. Hope, 57 Cal. 493. No misrepresentation concerning the state of a party's own title to land can be treated as misleading to him.

Russell v. Branham, 8 Blackford's Reports (Ind.) 277. A party is not responsible for a misrepresentation of the legal effect of a contract.

First National Bank of Elkhart v. Osborne et al, 18 Ind. App. 442.

Now, applying the doctrine as thus established by the authorities, it is perfectly manifest that the alleged false representations made by the proofs of the eight entrymen and their witnesses were wholly immaterial to the inquiry and to the transactions of the entrymen with the Government; and not only this, the representations were of facts upon which the Government had no right to rely. The Government knew the law and was cognizant of the proper interpretation thereof, and, having such knowledge, it could not be deceived by proofs that had relation to acts that could not in any way be construed as a compliance therewith.

The Government seeks to meet this objection to the right of recovery by invoking the doctrine that a party who has effected his purpose through a misrepresentation cannot deny its materiality. Bigelow on Fraud, 497. Citing also *Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co.*, 37 L. R. A. 593, and note.

But the law cannot make that material which is absolutely not material, and so appears by the very transaction itself and the law governing the case. The law of estoppel cannot go so far as to make false representations made in one transaction binding in another and a totally distinct transaction.

It is further suggested that the matter of materiality is for the jury and not for the court.

“Concerning the elements which go to make up a case of fraud, it is for the court and not for the jury to determine whether e. g. an inducement held out by one party to another, which the latter professes to have acted upon, is material or not.

* * * Generally speaking it is also for the court to interpret language of a perfectly plain nature, unaffected by external facts such as the particular circumstances in which it was used; when so modified, it is for the jury to declare its meaning. But when, as we have just said, the language is plain and not subject to modification aliunde, the case is for the court; and this is

true in principle whether the language be written or oral. There is no question of the truth of this proposition when applied to written language; and there ought to be none in regard to oral statement, for no sound distinction can be drawn between the two cases."

Bigelow on fraud, p. 139.

This quotation from Bigelow answers the objection. As it relates to the eight entrymen, I am impelled to the conclusion that the answer states a good defense.

The case of Wells presents the question in a different aspect. Wells made application October 1, 1900, and commuted May 26, 1902. Under the statute (Sec. 2301 R. S.), Wells was entitled to commute, if so entitled at all, upon making proof of settlement and of residence and cultivation for a period of fourteen months. The act of August 15, 1894, requires actual residence. *Adams v. Coates*, 38 Land Decisions, 179. Wells by his own testimony shows that he had not actually resided on his homestead anywhere near fourteen months. He was asked, "How much time since entry have you actually lived upon the land?" To which he answered, "Between the time of entry, viz., October 1, 1900, and the present time I have been there five times, remaining there each time from one to two weeks."

The Government knew from this testimony that Wells had not complied with the law. Notwithstanding,

it issued to him the final receipt and later the patent. Being fully aware of the situation, the Government could not have been deceived by the proofs made. Even if true, the proofs did not entitle Wells to his final receipt or patent. So that, in either aspect, the Government could not have been defrauded of the land. If it be argued that the Government relied upon the proofs, the natural and pertinent answer is that, knowing the law and the requirements of Congress in such a case, it had no right to rely upon them, whether true or false, to the extent of approving the claim and issuing final receipt and patent. Such being the situation, the Government is not entitled to an action in deceit.

The demurrer will be sustained as to the second further and separate defense, and overruled as to the third.

As to the fourth, I am still of the opinion that this is not the time to pass upon the question involved.

Judgment accordingly.

Filed March 31, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 31st day of March, 1916, there was duly filed in said Court and cause, a Reply in words and figures as follows, to wit:

REPLY.

Comes now the complainant in the above entitled action, and by this reply denies each and every allegation contained in defendant's first further and separate an-

swer and alleged defense, except as in the complaint of complainant alleged; and here replying to defendant's third and fourth further and separate amended answers and defenses, complainant admits, denies and alleges:

I.

Replying to paragraph I of defendant's third, further and separate amended answer, complainant alleges that the several tracts of land in the complaint described as having been respectively entered by the entrymen therein mentioned were, at the time the same were entered, subject to entry as homesteads under and pursuant to the act of Congress approved August 15, 1894, as amended by acts of Congress approved May 17, 1900, and January 26, 1901, and that each of said tracts of land was entered as a homestead at the time and by the person alleged in the complaint of complainant under said acts of Congress and not otherwise, and complainant admits that the said entrymen did not pay the sum of \$1.50 per acre or any sum per acre for said lands so entered, or any thereof (except as said entryman Wells paid for commutation of his one of said entries) because and by reason of the provisions of said act of Congress approved May 17, 1900, and referred to in paragraph III of the complaint of complainant; and complainant further admits that by the provisions of said act of August 15, 1894, as amended by said act of Congress approved May 17, 1900, and upon claims made thereunder

and not commuted under the provisions of said act of Congress approved January 26, 1901, three years actual residence on the land was required of the entryman to be established by such evidence as was required in homestead proofs, and that such proof of such residence on the part of such entryman was prerequisite to the passing of title or issue of patent to the lands so entered, but complainant denies each and every other allegation of said paragraph of said third further and separate amended answer contained.

II.

Replying to paragraph II of defendant's third further and separate amended answer, complainant admits that the entrymen named in the complaint of complainant, namely, Benjamin S. Hunter, Oliver I. Conner, William Teghtmeier, Robert D. Depue, Joseph Gillis, Thomas Johnson, Edward C. Brigham and Anthony Gannon, respectively entered the respective tracts of land in the complaint described and averred to have been by them respectively entered under the said act of Congress approved August 15, 1894, as amended by said act of Congress approved May 17, 1900, and on the dates in the said complaint alleged, and complainant admits each and every other allegation in said paragraph II of said further and separate amended answer contained.

III.

Replying to paragraph III of defendant's third fur-

ther and separate amended answer, complainant admits each and every allegation therein contained and the whole thereof.

IV.

Replying to paragraph IV of defendant's third further and separate amended answer, complainant admits that complainant and its agents and officers, in considering and passing on the final proofs of the entrymen Hunter, Conner, Teghtmeier, Depue, Gillis, Johnson, Brigham, and Gannon, well knew that each of said entrymen and his final proof witnesses had therein testified, stated and claimed less than two years actual residence on the part of such entryman upon his entry and admits that neither the said complainant nor any of its agents or officers, in considering said final proofs believed or understood or had any reason to believe or understand that any of said entrymen had represented or claimed to have resided upon said lands so by them entered, or any thereof, for three years, and admits that complainant and each and all of its agents and officers gave and allowed to each of said entrymen credit for military service as aforesaid, as a major part of the three years' actual residence required by said act of Congress approved August 15, 1894, as amended by said act of Congress approved May 17, 1900, and issued the final certificates and patents to said entrymen mentioned and referred to in the complaint of complainant, but complainant denies each and every other allegation in said

paragraph of said third further and separate amended answer contained, and avers that the issuance of said final certificates and patents was induced by the fraud heretofore alleged of defendant and of said entrymen and witnesses aforesaid; and complainant further alleges but for the said fraud so by defendant and by said entrymen and proof witnesses practiced upon complainant as in the complaint thereof alleged, none of said final certificates or patents would have been by complainant issued.

V.

Replying to paragraphs V, and VI of the third further and separate amended answer of defendant complainant admits each and every allegation in said paragraphs contained and the whole thereof.

VI.

Replying to paragraph VII of the third further and separate amended answer of defendant, complainant admits that the said entryman Wells made commutation homestead proof on said 26th day of May, 1902, and in making such proof testified, among other things, substantially as is set forth in said paragraph VII aforesaid, but complainant denies that the whole of the testimony and proof of said Wells is in said paragraph set forth, and avers that that portion of the testimony and proof set forth in said paragraph VII is but a part and portion of the fraudulent and false testimony and final

proof submitted by said Wells and by his said witnesses; and complainant avers that on said 26th day of May, 1902, and as a part of his final homestead proof, and in addition to the testimony in said paragraph VII of said further and separate amended answer set forth, the said Wells falsely swore and testified, among other things, as follows:

“I, John L. Wells, claiming the right to commute under Section 2301 of the Revised Statutes of the United States, my homestead entry No. ———, made upon the S $\frac{1}{2}$ SE $\frac{1}{4}$ and Lots 1 and 2, Sec. 10—NE $\frac{1}{4}$ NE $\frac{1}{4}$ section 15, township 9 S range 10 W, do solemnly swear that I made settlement upon said land on the ——— day of August, 1900, and that since such date, to wit: on the ——— day of August, 1900, I have built a house on said land, and have continued to reside thereon up to the present time.”

And among other things, as follows:

“Q. Why have you not spent more time upon your claim?

A. I had to get away to get my living as I could not get a living on the claim and had to earn my living. I am an insurance agent and have been attending at the local office in Portland upon this business, and thus only temporarily absent from my claim for this purpose. I do

not own any home anywhere except upon this claim. My wife was there with me in August, 1901, remaining there with me two weeks. It is impossible for us to remain steadily upon the tract in its present condition, and we have done the best we could to fulfill the law and at the same time earn a living for ourselves."

And among other things, as follows:

"I, John L. Wells, having made a homestead entry on the S $\frac{1}{2}$ SE $\frac{1}{4}$ and lots 1 & 2, section 10 and NE $\frac{1}{4}$ NE $\frac{1}{4}$ section No. 15, in township No. 9 S. range No. 10 W., subject to entry at Oregon City, Oregon, under Section 2301 of the Revised Statutes of the United States do now apply to perfect my claim thereto by virtue of Section 2301 of the Revised Statutes of the United States, and for that purpose do solemnly swear that I am a native born citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said lands since the ——— day of August, 1900, to the present time."

And complainant further avers that by the sworn testimony and answers of George West, one of the witnesses upon final proof of the said Wells, and given on said 26th day of May, 1902, it was by said West and by the fraudulent procurement of said Jones as in the

complaint of complainant alleged, falsely and fraudulently testified, among other things, as follows:

“Q. When did claimant settle upon the homestead, and what date did he establish actual residence thereon?

A. August, 1900—same time.

Q. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried state the fact).

A. He has lived there continuously, his wife has lived there while she was well.

Q. For what period or periods has the settler been absent from the land since making settlement, and for what purpose, and if temporarily absent did claimant's family reside upon and cultivate the land during such absence?

A. He has been off for two or three months at one time on business—at first he was unmarried, but his wife has lived on the place since except when he was off on business.”

Complainant further avers: that by the sworn testimony and answers of William Teghtmeier, one of the witnesses, upon final proof of the said Wells, and given on the 26th day of May, 1902, it was by said Teghtmeier and by the fraudulent procurement of said Jones,

as in the complaint of complainant alleged falsely and fraudulently testified among other things as follows:

“Q. When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

A. August 26, 1900, I think—same date.

Q. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried state the fact).

A. He is married—they have lived there continuously.

Q. For what period or periods has the settler been absent from the land since making settlement and for what purpose and if temporarily absent did claimant's family reside upon and cultivate the land during such absence?

A. No, he has never been absent.”

VII.

Replying to paragraph VIII of the third further and separate amended answer of defendant complainant admits that the answers and representations of said entryman Wells in paragraph VII of said third further and separate amended answer of defendant set forth and by that portion of the final proof of said entryman Wells,

the said Wells notified and advised plaintiff that he had not been actually present upon his said land and entry in excess of the total period of ten weeks prior to defendant making such final proof and which said final proof is the homestead proof referred to in complainant's complaint, and complainant admits that complainant and its officers and agents in considering said final proof of said Wells and in issuing the final certificate and patent to said Wells referred to in said complainant's complaint knew and understood that said Wells had not been actually present upon his said homestead entry and land in excess of said total period of ten weeks and so knowing and understanding that complainant issued said certificate and patent to said Wells in said complaint mentioned, but complainant denies each and every other allegation in said paragraph contained, and further alleges that but for the said fraud so by defendant and by the said Wells and his proof witnesses practiced upon complainant as in the complaint thereof alleged, the said final certificate or patent would not have been by complainant to said Wells issued.

VIII.

Replying to paragraph I of the fourth further and separate answer of the defendant, complainant admits that each of the entrymen mentioned and referred to in paragraph II of the third further and separate amended answer herein, in making and submitting his final home-

stead proof in the complaint mentioned and referred to, personally, and each of his final proof witnesses testified, stated, and advised the plaintiff, its agents and officers, that he, the said entryman, had not resided upon the land by him entered as in the complaint described or any thereof prior to the making of his homestead or final proof in the complaint mentioned for a period of three years nor for any greater period generally than from one to one and one-half years, and in one instance (Teghtmeier) one and three-fourths years, and complainant admits that complainant and its officers and agents, in considering said homestead or final proofs and in issuing the final certificates and patents in the complaint mentioned well knew and understood that each of said entrymen had not resided upon the land by him entered in the complaint mentioned for three years prior to the making of the homestead or final proof in said complaint mentioned, nor for any greater period of time than that shown by said proof of said entrymen in each entry, and that complainant and its agents and officers, notwithstanding said knowledge and understanding, issued said certificates and patents in the complaint mentioned, but complainant denies that said certificates and patents were issued by complainant and its agents and officers by mistake or error of law; and avers that the issuance thereof was induced by the fraud heretofore alleged of defendant and said entrymen and witnesses aforesaid; and complainant further alleges that but for the said

fraud so by defendant and by said entrymen and proof witnesses practiced upon complainant as in the complaint thereof alleged, none of said final certificates or patents would have been by complainant issued.

IX.

Replying to paragraph II of said fourth further and separate amended answer of defendant, complainant admits that said Wells paid plaintiff for the tract consisting of 160 acres entered by him, in the complaint mentioned, the sum of two hundred forty (\$240.00) dollars upon commutation of his said entry, and prior to the issuance of patent therefor as in complainant's complaint alleged, but complainant denies each and every other allegation in said paragraph contained.

X.

Replying to paragraph III of said fourth further and separate amended answer of defendant complainant admits each and every allegation therein contained and the whole thereof.

XI.

Replying to paragraph IV of said fourth further and separate amended answer of defendant, complainant denies each and every allegation therein contained, and the whole thereof.

WHEREFORE complainant demands judgment

against defendant as in complainant's complaint heretofore demanded.

EVERETT A. JOHNSON,
Assistant United States Attorney for Oregon.

United States of America,
District of Oregon—ss.

I, Everett A. Johnson, being first duly sworn depose and say that I am Assistant United States Attorney for the District of Oregon, and that I have prepared the foregoing reply and know the contents thereof, and that the allegations therein contained are true as I verily believe.

EVERETT A. JOHNSON,

Subscribed and sworn to before me this 31st day of March, 1916.

(Seal)

John J. Beckman,
Notary Public for Oregon.

My commission expires February 16, 1917.

United States of America,
District of Oregon—ss.

Service of the within Reply is hereby acknowledged by acceptance of a copy thereof duly certified to as such by Everett A. Johnson, Assistant United States Attorney, this —— day of March, 1916.

FULTON & BOWERMAN,
Of Attorneys for Defendant.

Filed March 31, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 1st day of April, 1916, there was duly filed in said Court and cause a Motion for Judgment on the pleadings, in words and figures as follows, to wit:

MOTION FOR JUDGMENT ON THE PLEADINGS.

Comes now the defendant in the above entitled cause and said cause being at issue, moves the court for a judgment dismissing said action, for the reason that on the face of the pleadings, and under the facts alleged and admitted, it appears that the plaintiff is not entitled to recover against the defendant.

FULTON & BOWERMAN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah—ss.

Due service of the within motion by the delivery of a duly certified copy thereof as provided by law, at Portland, Oregon, on this 1st day of April, 1916, is hereby admitted.

E. A. JOHNSON,
Assistant U. S. Attorney and of Attorneys for Complainant.

Filed April 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 1st day of April, 1916, the same being the 24th judicial day of the regular March, 1916, term of said court; present: the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

JUDGMENT.

Now, at this day, come the plaintiff by Mr. Everett A. Johnson, Assistant United States Attorney and the defendant by Mr. C. W. Fulton, of counsel; whereupon this cause comes on to be heard upon the motion of said defendant for judgment upon the pleadings, and the Court having heard the arguments of counsel and being fully advised in the premises,

IT IS ORDERED that said motion be, and the same is hereby allowed and that said plaintiff take nothing by this action, and that said defendant go hence without day.

And afterwards, to wit, on the 24th day of May, 1916, there was duly filed in said Court and cause a Petition for Writ of Error, in words and figures as follows, to wit:

PETITION FOR WRIT OF ERROR.

Comes now the complainant, United States of America, by Clarence L. Reames, United States Attorney for

Oregon, and Barnett L. Goldstein, Assistant United States Attorney for Oregon, under and by authority and direction of the Attorney General of the United States, and says that on the 1st day of April, 1916, this court entered judgment herein in favor of the defendant and against the complainant, in which judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this complainant, all of which will more in detail appear from the assignment of errors which this complainant filed with this petition.

WHEREFORE, this complainant prays that a writ of error may be issued in its behalf out of the United States Circuit Court of Appeals for the ninth circuit for the correction of errors so complained of, and that a transcript of record, proceedings and papers in this cause duly authenticated may be sent to such Circuit Court of Appeals for said circuit.

CLARENCE L. REAMES,

United States Attorney.

BARNETT H. GOLDSTEIN,

Assistant United States Attorney.

Filed May 24, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 24th day of May, 1916, there was duly filed in said Court and cause, an Assignment of Errors in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

Comes now the United States of America, the plaintiff in the above entitled cause, appearing by Clarence L. Reames, United States Attorney, and Barnett H. Goldstein, Assistant United States Attorney for the district of Oregon, and in connection with its petition for writ of error from the judgment made and entered in said cause in this court on the 1st day of April, 1916, files this, its assignment of errors, upon which it intends to rely in the prosecution of its said writ of error:

I.

The court erred in allowing and granting defendant's motion for a judgment dismissing the above entitled cause upon the pleadings.

II.

The court erred in holding and deciding that on the face of the pleadings and upon the facts alleged and admitted the plaintiff was not entitled to recover against the defendant.

III.

The court erred in holding and deciding that the fraudulent representations made by the respective entrymen in support of their entries embracing the lands involved in said cause were immaterial.

IV.

The court erred in holding that because of an alleged

erroneous allowance by the officials of plaintiff's land department of military service in lieu of a period of actual residence, the false and fraudulent affidavits and proofs made by the homestead entrymen were immaterial, notwithstanding that such false and fraudulent affidavits and proofs were relied upon as true by officials of plaintiff's land department, and if such affidavits and proofs had not been made no patents for the lands involved would have been issued.

V.

The court erred in holding and deciding that the plaintiff was not entitled to recover, when it appears from the pleadings that the homestead entries embracing the lands involved, in support of which the false and fraudulent proofs of residence were offered, were not in fact made by the respective entrymen for their own benefit, but, on the contrary, were made for the benefit of the defendant, in violation of the law.

VI.

The court erred in holding and deciding that the proof in support of the homestead entry made by John L. Wells showed that the requisite term of residence had not been maintained, and that therefore the false and fraudulent representations made by him were immaterial.

VII.

The court erred in not holding and deciding that the

homestead entries embracing the lands involved, having been made by the respective entrymen not in their own behalf or for their own benefit, but at the instigation and for the benefit of the defendant, said homestead entries were therefore illegal and fraudulent and constituted the means by which the defendant wrongfully deprived the plaintiff of its title to valuable tracts of land.

VIII.

The court erred in for any reason rendering judgment in favor of the defendant upon the pleadings.

WHEREFORE the plaintiff prays that the said judgment of the district court be in all things reversed and that such directions be given to correct the errors complained of as of right and according to law should be done.

CLARENCE L. REAMES,
United States Attorney.

BARNETT H. GOLDSTEIN,
Assistant United States Attorney.

Filed May 24, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Wednesday, the 24th day of May, 1916, the same being the 69th judicial day of the regular March, 1916, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER ALLOWING WRIT OF ERROR.

On this 24th day of May, 1916, the above named plaintiff appearing by Barnett H. Goldstein, Assistant United States Attorney for the district of Oregon, and filing herein and presenting to the court its petition praying for an allowance of a writ of error and assignment of errors intended to be urged by it, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the ninth circuit, and that such other and further proceedings may be had as may be proper in the premises,

Now, on consideration thereof, the court does allow the writ of error as prayed in the petition of plaintiff without bond of the plaintiff, it appearing that the above entitled cause is one in which the United States of America is appellant, and is brought under and by direction of the Attorney General of the United States.

R. S. BEAN,

Judge of the District Court.

Filed May 25, 1916. G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. MARSH, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on writ of error in the case in which the United States of America is plaintiff and plaintiff in error, and Willard N. Jones is defendant and defendant in error, in accordance with the law and rules of court and in accordance with the praecipe of said plaintiff in error, and that the said transcript is a full, true, and correct transcript of the record and proceedings had in said court in said cause in accordance with the said praecipe as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is \$. for printing said transcript, and that the same has been paid by said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this day of June, 1916.

Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

WILLARD N. JONES,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United
States for the District of Oregon.

CLARENCE L. REAMES,
United States Attorney for Oregon,
BARNETT H. GOLDSTEIN,
Assistant United States Attorney for Oregon,
Attorneys for Plaintiff in Error.
FULTON & BOWERMAN, of Portland, Oregon,
SCHWARTZ & SAUNDERS, of Portland, Oregon,
Attorneys for Defendant in Error.

FILED
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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

WILLARD N. JONES,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United
States for the District of Oregon.

BRIEF OF APPELLANT.

The appellant, United States of America, appeals from a judgment upon the pleadings rendered by the District Court of Oregon in favor of the defendant, Willard N. Jones.

STATEMENT OF THE CASE.

This is an action at law brought by the Government to recover damages for alleged fraud and deceit committed by the defendant Willard N. Jones in securing the issuance of patents to certain lands within the diminished Siletz reservation in the State of Oregon through the procurement by the defendant of nine entrymen to make fraudulent entries and proofs under the homestead act.

Briefly, the complaint avers that between August 15, 1900, and February 25, 1901, the defendant, intending to deceive the officers of the government, and to defraud and cheat the government out of the title, use and possession of a large portion of its unappropriated public lands open to settlement and entry under the homestead laws, with a view to acquiring title thereto in himself, solicited, induced and entered into a fraudulent arrangement with nine veterans of the Civil War, qualified to make homestead entries, whereby said entrymen should make homestead application for certain heavily timbered lands within the diminished Siletz reservation subject to homestead entry, and should thereafter make and submit fraudulent proofs as to settlement, residence, improvements and cultivation, etc., and that

thereafter, in pursuance to such solicitation, inducement and arrangement, the said entrymen did make such fraudulent proofs; that in reliance upon the said representations contained in said proofs and believing the same to be true, patents were issued to each of the nine entrymen, conveying the title to the land entered; that by reason of the false and fraudulent representations and unlawful collusive and corrupt agreement and understanding between said entrymen and the defendant, the plaintiff was wrongfully and unlawfully induced to issue said patents and part with the title to said lands, to its damage in the sum of \$133,000, for which sum judgment is prayed.

The fraudulent representations alleged in the complaint are:

That in said final proofs, each of said entrymen represented that he had established a residence upon the land embraced in said entry; had made substantial improvements thereon; had cultivated that portion of said lands described in his proof and had not conveyed any part of said lands and had not made any contract directly or indirectly whereby the title which he might acquire from the government should inure in whole or in part to the benefit of any person except himself; and that he was

acting in good faith in perfecting the entry; when in truth and in fact, each of said entrymen then and there well know that each and every one of said representations were false; that whatever cultivation and improvement were made, were made by the defendant, who also paid the fees and expenses in connection with such entries; that none of said entrymen acted in good faith nor with the intent to secure a home each for himself, but for speculative purposes, in conformity with the contract set out in the said complaint whereby in pursuance to which, the land entered was thereafter mortgaged to said defendant.

The lands were entered under the act of August 15, 1894 (28 Stat. L. 286, 326), wherein provision was made for disposition of certain ceded lands formerly a part of the Siletz reservation, in language following:

“The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the townsite law and under the provisions of the homestead law. Provided, however, that each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from

the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent."

Subsequently, by act of May 17, 1900 (31 Stat. 179), Congress provided in effect that, upon payment to the local land officers of the usual and customary fees, no other or further charge of any kind whatsoever should be required from such settler to entitle him to a patent to the lands covered by his entry. This was designed as an amendment of the act of August 15, 1894, and relieved the entryman from payment of \$1.50 per acre as a prerequisite to obtaining his patent from the government. Subsequently, by act of Congress, approved January 26, 1901 (31 Stat. L. 740), the former acts of Congress opening to homestead entry the ceded Siletz lands were amended by extending the right of commutation to these lands upon the payment of the original price of \$1.50 per acre.

The amended answer of the defendant, after a denial of any fraud on the part of either the defendant or the entrymen, sets up four further and separate answers. The first separate defense admitted the making of the instrument or contract with the entrymen alleged in the complaint, but pleaded his good faith; the second sep-

arate defense pleaded the statute of limitations, and the fourth separate defense relates wholly to the measure of damages that should be applied if recovery be had.

For a third further and separate answer and defense it is averred that as to eight of the entrymen (all but Wells) it was not represented in their proofs that they had resided upon their respective claims for a period of three years; the proofs showing only residence varying from thirteen to twenty months supplemented by proof of service in the army or navy of the United States for the remaining period of three years. The defendant then alleged that the plaintiff and its officers in considering and passing on said final proofs well knew that each of said entrymen claimed less than two years actual residence, but that plaintiff and its officers, by mistake of law, allowed to each of said entrymen, credit for military service as a major part of three years actual residence required by law, and by reason of such mistake of law and not otherwise, the patents were issued, but as to the John L. Wells entry, which was commuted, it is alleged that the proof showed only ten weeks actual residence, whereas at least fourteen months actual residence was required by law.

A demurrer was interposed by the plaintiff to the second, third and fourth separate and further answers

of the defendant. The demurrer was sustained as to the second, separate defense which set up the statute of limitations, for the reason that the same question had been previously decided adversely to the defendant (*United States vs. Jones*, 218 Fed. 973); the demurrer was not passed upon as to the fourth separate defense concerning the question of damages. The demurrer, however, was overruled as to the third separate defense, the court holding in an opinion reported in *United States vs. Jones* 232 Fed. 219, that the false representations set out in the complaint were immaterial and afforded no relief to the plaintiff, in that the patents were issued under a misinterpretation of the law, requiring three years actual residence, and it appearing from the proofs themselves that no such residence was claimed, the entry-men were not entitled to patents.

The plaintiff's reply filed herein practically admitting the material allegations of said defendant's third further and separate answer, upon motion of the defendant for judgment on the pleadings, the court allowed the same. Thereupon this action was dismissed; from which judgment this appeal is now prosecuted.

ASSIGNMENTS OF ERROR.

I.

The court erred in allowing and granting defendant's motion for a judgment dismissing the above entitled cause upon the pleadings.

II.

The court erred in holding and deciding that on the face of the pleadings and upon the facts alleged and admitted the plaintiff was not entitled to recover against the defendant.

III.

The court erred in holding and deciding that the fraudulent representations made by the respective entrymen in support of their entries embracing the lands involved in said cause were immaterial.

IV.

The court erred in holding that because of an alleged erroneous allowance by the officials of plaintiff's land department of military service in lieu of a period of actual residence, the false and fraudulent affidavits and proofs made by the homestead entrymen were immaterial, notwithstanding that such false and fraudulent

affidavits and proofs were relied upon as true by officials of plaintiff's land department, and if such affidavits and proofs had not been made no patents for the lands involved would have been issued.

V.

The court erred in holding and deciding that the plaintiff was not entitled to recover, when it appears from the pleadings that the homestead entries embracing the lands involved, in support of which the false and fraudulent proofs of residence were offered, were not in fact made by the respective entrymen for their own benefit, but, on the contrary, were made for the benefit of the defendant, in violation of the law.

VI.

The court erred in holding and deciding that the proof in support of the homestead entry made by John L. Wells showed that the requisite term of residence had not been maintained, and that therefore the false and fraudulent representations made by him were immaterial.

VII.

The court erred in not holding and deciding that the homestead entries embracing the lands involved, hav-

ing been made by the respective entrymen not in their own behalf or for their own benefit, but at the instigation and for the benefit of the defendant, said homestead entries were therefore illegal and fraudulent and constituted the means by which the defendant wrongfully deprived the plaintiff of its title to valuable tracts of land.

VIII.

The court erred in for any reason rendering judgment in favor of the defendant upon the pleadings.

The gist of the various assignments of error is the materiality of the false representations made in securing the patents, and for the purpose of this appeal, it could possibly be briefly stated to raise but one vital question: That, even assuming that the Land Department issued the patents under a misapplication of the law as to the actual period of residence required under the Siletz Act, can it be contended as a proposition of law that the false representations as to the *good faith* of the entrymen, the *purpose* for which the entries were made, and the period of *residence* and *cultivation* actually submitted, are immaterial, when but for such representations, the *patents would under no circumstances have been issued*.

THE QUESTIONS INVOLVED.

I. Whether in an action for fraud and deceit false and fraudulent affidavits and proofs respecting the purpose for which the entries for homestead were made and the terms of residence maintained, and the amount of cultivation and improvement performed upon the land are immaterial, although relied upon, when upon a correct application of the law, the proof as to the term of residence showed that the entrymen were not entitled to patents.

(a) Even with the allowance erroneously made for military service a period of actual residence was necessary;

(b) The proofs as to this residence were false and fraudulent;

(c) An erroneous allowance of military service in place of actual residence does not render the fraud and deceit immaterial;

(d) Military service alone would not have entitled the entrymen to patent;

(e) The homestead law was further violated by the entrymen making the entries not for their own exclusive

use and benefit but for the benefit of a third party and not for the purpose of actual settlement and cultivation.

II. Whether one who has effected his purpose through a fraudulent misrepresentation can deny its materiality.

III. Whether the court can, as a matter of law, hold that certain representations are immaterial when there are facts and circumstances in the case as set out in the pleadings from which a jury might have reached the conclusion that said representations were adequate to and did in fact induce the issuance of the patents which would not have been issued but for such representations.

IV. Whether the false and fraudulent proofs submitted in support of the Wells entry are immaterial notwithstanding that there was a showing that the requisite term of residence had been maintained in reliance upon which the patents were issued.

POINTS AND AUTHORITIES.

I.

THE HOMESTEAD IS A GIFT FROM THE GOVERNMENT AND SHALL BE FOR THE EXCLUSIVE BENEFIT OF THE HOMESTEADER.

(a) A person applying for an entry of a homestead claim shall make affidavit that among other things “such application is made *for his own exclusive use and benefit*, and that his entry is made for the purpose of *actual settlement and cultivation*, and not either directly or indirectly for the use or benefit of any other person.”

Sec. 2290 R. S.

Anderson vs. Carkins, 135 U. S. 487.

(b) Before patent is secured the applicant must make final proof by affidavit setting up a compliance with all these requirements and that no part of such land has been disposed of or alienated.

Sec. 2291 R. S.

Anderson vs. Carkins (*supra*).

Adams vs. Church, 193 U. S. 510.

(c) All of these requirements must be complied with in order to entitle the entrymen to patent.

United States vs. Mills, 190 Fed. 513.

United States vs. Minor, 114 U. S. 233.

United States vs. Diamond Coal & Coke Co., 233 U. S. 236.

United States vs. McCaskill, 216 U. S. 504.

(d) The purpose and policy of the homestead law is to encourage the settlement and improvement of the public lands.

McCorkell vs. Herron, 128 Ia. 324; 111 Am. St. 203.

II.

THE PATENTS FOR HOMESTEADS WERE ISSUED TO AND OBTAINED BY THE ENTRYMEN THROUGH THE PROCUREMENT OF DEFENDANT BY PROOFS TAINTED WITH FRAUD AND FALSE REPRESENTATIONS, FOR WHICH A CAUSE OF ACTION FOR DECEIT WILL LIE.

(a) Where patents are procured from the United States by fraud or mistake, the government may elect to rescind the patent or to ratify it and sue for damages.

United States vs. Pitain, 224 Fed. 604.

United States vs. Koleno, 226 Fed. 181.

United States vs. Bistline, 229 Fed. 546.

United States vs. Southern Pac. Co., 200 U. S. 341.

United States vs. Cooper, 220, F. 868.

(b) A patent will be canceled either on the ground that it was obtained by false and fraudulent statements or that it was issued through the inadvertence or mistake of the officers of the land office where both grounds are alleged. The bill may be sustained upon the latter ground if proved, although the proof fails to fully establish the first ground.

United States vs. Mills, 190 Fed. 513.

(c) The patent will be canceled on the ground of false and fraudulent statements in making proof of actual residence.

United States vs. Perry, 45 Fed. 759.

United States vs. Mills, 190 Fed. 513.

United States vs. Murphy, 193 Fed. 802.

(d) A patent will be canceled on the ground of false and fraudulent statements in making proof of actual cultivation.

United States vs. Minor, 114 U. S. 233.

(e) A patent will be canceled where the defendant induced another to make a homestead entry for the defendant's benefit.

United States vs. Gilson, 185 Fed. 484.

United States vs. Belt, 192 Fed. 708.

United States vs. Brant, 198 Fed. 449.

United States vs. Booth-Kelly Lumber Company, 203 Fed. 423.

(f) A patent will be canceled or an action for the value of the land will lie where said patent was issued contrary to law or through an erroneous interpretation of the law applicable thereto.

United States vs. Southern Pacific Co., 200 U. S. 341.

United States vs. Southern Pacific Co., 117 Fed. 545.

United States vs. O. & C. R. R. Co., 133 Fed. 954.

United States vs. Germania Iron Co., 165 U. S. 379.

(g) A patent will be canceled where all the requirements of the homestead law are set at naught and evaded and defied by one stupendous falsehood which included all of the requirements on which the right to secure the land rested.

United States vs. Minor, 114 U. S. 233.

United States vs. Mills, 190 Fed. 513.

III.

WHERE SEVERAL REQUIREMENTS TO COMPLY WITH THE HOMESTEAD LAW ARE ESSENTIAL A MISINTERPRETATION OF THE LAW AS TO ONE DOES NOT RENDER IMMATERIAL THE FALSE REPRESENTATIONS CONCERNING THE REMAINING REQUIREMENTS.

(a) False representations inducing a contract are material if the contract would not have been made but for such representations.

Bigelow on Fraud, Vol. I, p. 544.

A. & E. Enc. of Law, Vol. 14, p. 62.

Lane vs. Harmony, 112 Me. 25.

White Sewing Machine Co. vs. Bullock, 76 S. E.
(N. C.) 634.

12 R. C. L. 297.

(b) It is not necessary to prove that the plaintiff relied solely upon the defendant's representations. It is sufficient if the representations were relied upon by the plaintiff as constituting one of the substantial inducements to his action.

Bigelow on Fraud, Vol. I, p. 544.

Smith on Fraud, Sec. 61.

James vs. Hodson, 47 Vt. 127.

(c) It is enough that the representations materially influenced the conduct of the plaintiff though (being combined with other motives) they were not the sole or even predominant inducement to the party's action.

Bigelow on Fraud, Vol. I, p. 544.

Safford vs. Grout, 120 Mass. 20.

IV.

MATERIALITY OF FALSE REPRESENTATIONS.

(a) One who has effected his purpose through a fraudulent misrepresentation cannot deny its materiality.

Bigelow, Vol. I, p. 497.

Bigelow on Estoppel, 6th Ed. p. 646.

Antle vs. Sexton, 137 Ill. 410.

Kehl vs. Abram, 210 Ill. 218.

Dodge vs. Pope, 93 Ind. 480.

Dezell vs. O'Dell, 3 Hill 215.

Warder vs. Ehitish, 77 Wis. 430.

Brent vs. Lilly Co., 174 Fed. 877.

Strand vs. Griffith, 97 Fed. 854.

Tooker vs. Alston, 159 F. 599.

Reynell vs. Sprye, 1 De G. M. & G. 710.

Lunnington vs. Strong, 107 Ill. 302.

Fargo Gas Light & Coal Co. vs. Fargo Gas &
Elec. Co., 37 L. R. A. 593.

(b) Where the existence of fraud depends on a variety of circumstances, the matter of materiality of the representations is for the jury and not for the Court.

Newhall vs. Pierce, 115 Mass. 457.

Fottler vs. Moseley, 179 Mass. 295.

Sharp vs. Ponce, 74 Me. 470.

Bank of Bay City vs. Chappelle, 40 Mich. 447.

McNaughton vs. Smith, 91 Minn. 140.

Mosbey vs. McKee, 91 Mo. App. 500.

Sou. Commission Co. vs. Porter, 122 N. C., 692.

Kehl vs. Abram, 210 Ill. 218.

Hawley vs. Wicker, 117 N. Y. App. Div. 638.

Simon vs. Goodyear Metallic Rubber Shoe Co.,
105, F. 573.

Patten vs. Field, 81 Atl. 77.

V.

THE PROOF IN SUPPORT OF THE WELLS ENTRY, UNDER A CORRECT APPLICATION OF THE LAW, SHOWED THAT THE REQUISITE TERM OF RESIDENCE HAD BEEN MAINTAINED TO ENTITLE HIM TO PATENT AND THE PROOF BEING FRAUDULENT AND FALSE AN ACTION FOR DAMAGES WILL LIE.

(a) Wells, one of the entrymen, was entitled to commute after making proof of settlement and of residence and cultivation for a period of fourteen months.

(b) The question of residence is largely one of bona fides, and not one of actual presence upon the entry, and therefore the proof in support of the Wells entry on its face showed that the requisite term of residence had been maintained.

Sec. 2301, R. S.

(c) "Actual residence" is not synonymous with "actual presence upon the entry." This question turns upon the bona fides of the entrymen—necessarily a question of fact.

Waley vs. Northern Pacific R. R. Co., 167 Fed. 665.

U. S. vs. Richards, 149 Fed. 445.

ARGUMENT.

The allegations in the complaint disclose a clear, palpable and deliberate fraud practiced upon the government, by means of perjury, deception, circumvention and a flagrant violation of the homestead laws, to deprive it unlawfully of public land of the value of \$133,000. The lower court has held that the government is without remedy or redress. It would be inconceivable and unconscionable that the plaintiff would be absolutely without remedy on account of the fraud perpetrated in depriving it of valuable land and to permit the defendant to reap the fruits of said fraud. Upon the face of the record it is apparent that the government was imposed upon, deceived and cheated by the fraud and false swearing of the entrymen under a collusive arrangement had with defendant who was to benefit thereby.

There can be no question of the fraud and its misleading effect upon the officers of the government entrusted with the disposition of the public lands. Can relief be denied and the beneficial policy of the government thwarted by subtle technicalities, evasions and a perversion of law? We doubt it. We have too great a veneration for the law to suppose that anything can be law which is not founded on common sense and common honesty.

Before entering into a discussion of the questions involved in this case, it might be well to briefly summarize:

1. The law under which the patents were issued;
2. The gist of alleged fraud committed by the defendant;
3. The decisions applicable to the requirements prerequisite to patent, and
4. The remedy provided where fraud is practiced upon the government in connection therewith.

1. The entries mentioned in the complaint were made under the act of August 15, 1894 (28 Stat. 286, 326). The act, in brief, throws open to disposition for settlement certain ceded lands formerly a part of the Siletz reservation. It specifically provides in dealing

with this land that three years actual residence on the land is required in making a final proof as a prerequisite to title or patent. This requirement is seized upon by the defendant for his cloak of immunity to shield and protect him in the enjoyment of his spoils.

It may be conceded at the outset that this requirement means actual residence for a term of three years, and not for a portion thereof supplemented by time for military or other service. In issuing the certificates and granting the patents, the land department, under a misinterpretation of the law relative thereto, allowed the military service of eight of the entrymen to be deducted from the time of residence which in each case was less than three years, and in doing so put into effect and applied the provisions of sections 2304 and 2305 revised statutes, and the act of January 26, 1901 (31 Stat. 740), relating to the commutation of homestead entries in certain cases. The act of August 15, 1894, as it applies to the Siletz reservation lands admits of no such application and permits no commutation. But, it must be borne in mind that the requirement as to term of residence in the last mentioned act does not supersede or render unnecessary the general requirements of the homestead law relative to qualifications of entrymen, and the purpose for which application for entry was made.

It merely limits and defines the period of actual residence required so far as the Siletz lands are concerned.

Section 2290 of the revised statutes provides that a person applying for entry of a homestead claim shall make affidavit that among other things "*such application is made for his own exclusive use and benefit,*" and that his entry is made *for the purpose of actual settlement and cultivation*, and not either directly or indirectly for the use or benefit of any other person.

Section 2291 of the revised statutes, which prescribes the time and manner of the final proof, requires that the applicant make "affidavit that no part of such land *has been alienated*, except as provided in section 2288," which section, however, does not contemplate or embrace the alienation of the land as set out in the complaint.

2. It is charged that the defendant, with the intent to deceive the officers of the United States having authority over the public lands, and to defraud plaintiff out of the title to a large portion of its unappropriated lands open to settlement and entry under the homestead laws, solicited and procured certain persons named therein to make homestead applications and affidavits, each application being for 160 acres of land. The following is a list of the persons who made said applications, to-

gether with the number and date of same, as well as the date of final proof:

Benjamin S. Hunter, No. 13135, October 9, 1900; final proof Dec. 23, 1901.

Oliver I. Connor, No. 13116, October 6, 1900; final proof Nov. 4, 1901.

Wm. Teghtmeier, No. 13396, February 25, 1901; final proof May 26, 1902.

Richard D. Depue, No. 13113, October 5, 1900; final proof Nov. 25, 1901.

Joseph Gillis, No. 13088, October 1, 1900; final proof Nov. 4, 1901.

Thomas Johnson, No. 13089, October 1, 1900; final proof Nov. 4, 1901.

John L. Wells, No. 13090, October 1, 1900; final proof May 26, 1902.

Edward C. Brigham, No. 13137, October 9, 1900; final proof Dec. 23, 1901.

Anthony Gannon, No. 13087, October 1, 1900; final proof Nov. 25, 1901.

That at the time of soliciting and procuring such persons to make such applications, and before the filing

of same, the defendant had induced each of said entrymen to subscribe to a contract, as fully set out in said complaint, wherein and whereby the defendant intended to conceal his design and to acquire title to the lands applied for by said entrymen and to conceal the fact that it was the intention of said defendant and entrymen to retain the then places of residence of each of said entrymen; that it was not intended by said defendant for said entrymen to reside upon or make their home upon the lands applied for during the life of said entries as required by law; that it was further wrongfully intended and designed by said defendant that each of said entrymen should falsely make proof that he had established a residence upon the lands and had resided continuously thereon for the length of time prescribed by law; that each of said entrymen had cultivated a substantial portion of said lands and had made substantial improvements thereon, when in truth, as the defendant well knew, none of the said entrymen would at the time of making said proof have established a residence upon the lands nor resided thereon, would not have cultivated any part thereof, nor have made any improvements thereon; that thereafter the defendant, in order to carry out the said fraudulent intention and design, and pursuant to the fraudulent and collusive understanding and agree-

ment entered into between them, the said defendant caused each of said entrymen to make final proof, wherein and whereby each of said entrymen falsely and fraudulently represented:

(a) That he had established a residence upon and resided upon the land continuously after the alleged establishment of residence thereon until the time of said proof;

(b) That he had made substantial improvements thereon;

(c) That he had cultivated the lands;

(d) That he had not conveyed any part of said lands and had not made any contract directly or indirectly whereby the title which he might acquire from the government should inure in whole or in part to the benefit of any person except himself; and

(e) That he was acting in good faith in perfecting the entry.

When in truth, as each of said entrymen then and there well knew at the time of making said proofs, that each and every one of said representations were false; when in truth all of the entrymen in making their respective entries continued at all times during the life of their respective entries to reside at Portland, Oregon, except

Benjamin S. Hunter, who resided at all of said times at Dundee, Oregon.

It is further charged that the defendant paid to the United States the required fees and furnished proof witnesses and other expenses in connection with said entries, for the purpose of defrauding the government out of said lands; that the land officers of the United States, being ignorant of the false and fraudulent representations, issued final certificates to each of said entrymen who thereafter received patents and executed a mortgage to the defendant in conformity with their collusive agreement; that all of said false and fraudulent representations made by the said entrymen were made with knowledge and at the solicitation of the defendant, and with the intent to defraud the government out of the use of the title to and possession of the lands; that the plaintiff relied upon the false and fraudulent representations and was defrauded thereby, and by reason of such false representations and unlawful, collusive and corrupt agreement between said entrymen and defendant, plaintiff was wrongfully induced to issue patents and part with title to said land to its damage in the sum of \$133,000.

The gist of plaintiff's complaint, in substance, is the fraud and deceit of defendant in procuring nine entry-

men to make false and fraudulent representations in their applications and final proof for homestead which were relied upon by the defendant, who in reliance thereupon issued patents to the lands of the value of \$133,000.

The false and fraudulent representations complained of consist in:

- (a) Falsely swearing to have established a residence upon and resided upon the land continuously;
- (b) Falsely swearing to have made substantial improvements thereon;
- (c) Falsely swearing to have cultivated the lands;
- (d) Falsely swearing that he had not conveyed any part of said lands and had not made any contract directly or indirectly whereby the title which he might acquire from the government should inure in whole or in part to the benefit of any person except himself; and
- (e) Falsely swearing that he was acting in good faith in perfecting the entry.

It is further claimed that *all of said representations* contributed to the fraud perpetrated on the plaintiff by the defendant.

The vital point raised by defendant's answer is directed against the mistakes of the officers of the land de-

partment in issuing patents where there was no proof of the specific actual residence of three years, as required by the act under which said lands were opened to entry. It will thus be seen that the whole defense of the defendant rests on the plea that the government having erred in issuing the patents so far as the requisite term of residence was concerned, it matters not how false the representations were as to the actual duration of residence upon the land, how false the representations were as to the actual duration of residence upon the land, how false the representations were as to cultivation and improvement of the land, how false the representations were as to alienation of the land, how false the representations were as to the purpose for which the entry was made and patent sought, and how false the representations were as to the good faith of the entrymen.

3. The purpose of the homestead law is said by Mr. Justice Brewer in *Anderson vs. Carkins*, 135 U. S. 487:

“That the homestead shall be for the exclusive benefit of the homesteader.”

And in *McCorkell vs. Herron*, 111 Am. St. 203, 128 Ia. 324, it is said:

“The purpose and policy of the homestead act are to encourage the settlement and improvement of the public lands.”

And further, in *Anderson vs. Carlin* (*supra*) and *Adams vs. Church*, 193 U. S. 510, it is said:

“The homestead is a gift from the government to the homesteader conditioned upon his occupation for five years and upon his making no disposition or alienation during said term.”

In *U. S. vs. Richards*, 149 Fed. 445, the court said:

“The object and purpose of the homestead law of the United States were to grant land to actual bona fide settlers, persons making settlement upon the public lands for use as homesteads and to encourage residence upon, cultivation and improvement of the public domain. The applicant is required to verify that his statement is in good faith and made for the purpose of actual settlement and cultivation and not for the benefit of any other person.”

It is held in *United States vs. Minor*, 114 U. S. 233, and in *United States vs. Mills*, 190 Fed. 513, that the homestead law required in every instance the *settlement* and *residence* for a given time on the land, the actual cultivation of part of it, and that the claimant should do this with the purpose of acquiring real ownership in himself and not for another nor with the purpose of selling to another. In the case as presented by the complaint, none of these things were done, although the land officers were made to believe they were done by the false representations of the entrymen. It was a case where all the

requirements of the law were set at naught and evaded and defied by one stupendous falsehood, which included all the requirements on which this right to secure the land rested. (U. S. vs. Minor, *supra*.)

Where the beneficence of the government is imposed upon, its kind and philanthropic purposes set at naught by the fraud of the beneficiary, its aims and objects thwarted by the cunning of those who prey upon the credulous, and its goodness rewarded by ingratitude and deception, is there anything to be found in the relation of the government in such a case as this which will deprive it of the same right to relief as an individual would have? On the contrary, there are reasons why the government in this class of cases should not be held to the same diligence in guarding against fraud and imposition as a private owner of real estate. The government owns immense tracts of land which are placed in the hands of officers of the government, subject to entry under the homestead laws, and usually these officers are from necessity forced to act solely on the *ex parte* statements of the claimants and their witnesses (United States vs. Minor, *supra*), and where it has come to the knowledge of the government that a patent has been obtained through fraud and deception practiced upon the officers of the land department, and that such fraud would prejudice

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the interests of the United States and interferes with the government in fulfilling its obligations to the public, it is the duty of the government to institute judicial proceedings. The case in issue is, therefore, in the interest of public right and justice to correct a public wrong and fraud perpetrated by the defendant upon the government.

As stated in the case of the *Diamond Coal & Coke Co. vs. United States*, in 233 U. S. 236:

“Questions of fact arising in the administration of the public land laws, such as whether lands sought to be entered are mineral or non-mineral, are committed to the land officers for determination; and as their decision must rest largely or entirely upon proofs outside the official records, it is possible in *ex parte* proceedings, as was the case here, for applicants, by submitting false proofs, to impose upon those officers and secure entries and patents under one law, when if truthful proofs were submitted the lands could not be acquired under that law, but only under another imposing different restrictions upon their disposal. *A patent secured by such fraudulent practices, although not void or open to collateral attack, is nevertheless voidable, and may be annulled in a suit by the Government against the patentee or a purchaser with notice of the fraud.*”

4. By a long line of cases it has been held that where lands are procured from the United States by fraud or mistake the government may elect to rescind the patent,

where it has not passed to an innocent third party, or in any event to ratify it and sue for damages.

In *Southern Pacific Company vs. United States*, 200 U. S. 341, the court held, in part, as follows:

“When by mistake a tract of land is erroneously conveyed so that the vendee has obtained a patent, which does not belong to him and before the mistake is discovered, the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyance and re-establish in himself the title, but he may recover of his vendee the value of his land up to at least the sum received on the sale and thus confirm the title in the innocent purchaser.”

In the recent cases of *United States vs. Pitain*, 224 Fed. 604; *United States vs. Koleno*, 226 Fed. 181; and *United States vs. Bistline*, 229 Fed. 546, each of which was an action at law to recover damages for fraud in obtaining a patent under the homestead law and in each of which was involved the question of whether the United States in seeking redress was remitted to a suit in equity, the several courts in all of said cases held that patents procured from the United States by fraud are not void but voidable, and the government may elect to rescind the patent or to ratify it and sue for damages, and as tersely stated in *United States vs. Minor*, 114 U. S. 241, the government is entitled to all the remedy which the

court can give. The government, therefore, having the choice of two remedies where fraud has been perpetrated in acquiring patent, one for the recovery of the land where it has not passed to innocent purchasers, and the other for the value of the lands taken, it has in this case proceeded upon the latter theory.

The following cases are submitted in support of the proposition that where false and fraudulent statements are made by the entrymen as to any or all of the requirements, or even where patents are issued through the inadvertence or mistake of the officers of the land department, the patents will be canceled.

United States vs. Mills, 190 Fed. 513.

In this case, the defendant, in making a final proof under the homestead law, testified falsely as to the required residence and cultivation. The court held that both residence and cultivation of the land are required to entitle the entrymen to patent; that it was not intended that the patent should be granted when the entrymen never lived on the land, when he could have lived on it if he wished to do so, and when during the entire five years succeeding the filing of the claim he had a home and residence elsewhere; that if a claimant obtains a patent by false and fraudulent statements or evidence, the gov-

ernment, by direct proceedings in equity, can have it annulled, and the same rule obtains where by mistake or inadvertence of the officers of the land office the claimant procures a patent; that in cases where the allegations of the bill and the evidence point to fraud and wrong and also point to inadvertence and mistake, the bill may be sustained upon the latter ground if proved, although the proof fails to thoroughly establish the first ground.

United States vs. Perry, 45 Fed. 759.

This was a suit to cancel a patent issued under the homestead law. In this case the court, among other things, stated that the object of this law was to grant land to actual settlers for use as homesteads and to encourage the settlement, cultivation and improvement of the public domain; that in order to obtain valid title under this law it was necessary that there should be an *actual settlement of the land* and a *continuous residence* and *cultivation* thereon for at least five years; that the proofs taken in this case clearly show *no actual residence* prior to the issuance of patent, and the law not having been complied with, no right to a patent existed at the time the proofs were taken or at the time the patents issued.

United States vs. Murphy, 193 Fed. 802.

This was a suit to set aside a patent issued for a homestead entry. The evidence showed that there had been no such actual, continuous residence on the land by the homesteader with the intention of establishing a home there to the exclusion of one elsewhere, as the law required, or that the required improvements had been made.

United States vs. Minor, 114 U. S. 233.

This was a suit to set aside a patent on the ground of fraud. The court held that where one succeeded in obtaining patent by misrepresentations, by fraudulent practices aided by perjury, there would seem to be no reason why the United States as the owner of the land of which it has been defrauded by these means, should have all the remedy which the courts can give; that it was convinced that the officers of the land department were imposed upon and deceived by the fraud and false swearing of the party to whom the patent was issued; and that there could be no question of the fraud and its misleading effects on the officers of the government. The opinion, in part, reads as follows:

“If an individual or a corporation had been induced to part with the title to land or any other property by such a fraud as that set out in the pleading, there would seem to be no difficulty in recovering it back by appropriate judicial proceed-

ings. If it was a sale and conveyance of land induced by fraudulent misrepresentation of facts which had no existence, on which the grantor relied, and had a right to rely, and which were essential elements of the consideration, there would be no hesitation in a court of equity giving relief, and where the title remained in the possession of the fraudulent grantee, the court would surely annul the whole transaction and require a reconveyance of the land to the grantor. The case presented to us by the bill is one of unmitigated fraud and imposition consummated by means of representations on which alone the sale was made, everyone of which was false. The law and the rules governing the sales require in every instance, the settlement and residence for a given time on the land, the actual cultivation of a part of it, and building a house on it. It required that the claimant should do this for the purpose of acquiring ownership for himself and not for another, nor with a purpose to sell to another. In the case as presented by this bill, none of these things were done, though the land officers were made to believe they were done by the false representations of the defendant."

United States vs. Gilson, 185 Fed. 484.

In this case patent was issued to one Landis, who thereafter conveyed same to defendant Gilson. This was a suit to cancel patent on the ground that Landis did not enter the land under the homestead law in good faith, to acquire a homestead for himself, but acted as the instrument of Gilson to acquire title for the latter's use and benefit. The evidence showed that defendant in-

duced another man who was old, destitute and decrepit, to make a homestead entry of land not his own, paid the entry fees, and for the relinquishment of a prior entry, kept the entrymen in supplies until the entry was commuted; furnished the money to pay the commutation price, took a mortgage therefor and possession of the land, and a deed as soon as patent was issued; also that the proof of the improvement and cultivation on which the commutation was allowed was false, to the knowledge of defendant. The court held that this was sufficient to establish that the entry was made for the defendant's benefit and was fraudulent and to authorize the cancellation of the patent.

NOTE: The similarity of the facts in the case cited and the one at issue is most apparent. The case against Jones is made clear by the contract he entered into with the entrymen prior to the entries, the payment of the fees by Jones, and the subsequent conveyance of mortgage to him, in pursuance to the terms of the contract.

United States vs. Belt, 192 Fed. 708.

In this case defendant, who was a large owner of sheep which he pastured on the public lands, procured different persons to file homestead and stone and timber claims on lands within his range, paying their filing fees,

the expenses of their residences, and improvements, purchase price of the lands on commutation of entries and the further sum to each entryman, all of whom conveyed their lands to him on obtaining title. The homestead entrymen did not comply with the law as to residence and improvement, and their proofs were fraudulent. The court held:

“That such facts were sufficient to show that the entries were made under an agreement or understanding expressed or implied with the defendant that they were for his benefit, and that therefore, the United States was entitled to a cancellation of the patents for fraud.”

United States vs. Brandt, 198 Fed. 449.

This was a suit to cancel patent on the ground of alleged fraud in making entry and in procuring patent. The fraud consisted in this, that the entry was not made in good faith for the entryman's own benefit, and for the purpose of acquiring the same as a home for himself, but was made at the instance and for the purpose of acquiring the land for another. The court held:

“That the land was fraudulently entered and that the patent be set aside and canceled.”

McCaskill Co. vs. United States, 216 U. S. 504.

Mr. Justice McKenna, in speaking of the requirements of the homestead law said:

“It may be well here to consider what the law requires. It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that ‘application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person’; that applicant will honestly endeavor to comply with the requirements of settlement and cultivation and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefor, is to give a home, and to secure the gift the applicant must show that he has made the land a home. Residence and cultivation of the land are the price that is exacted for its payment.”

United States vs. Booth-Kelly Lumber Co., 203
Fed. 423.

This was a suit for the cancellation of patents to public lands entered under the stone and timber act on the ground of fraud. The evidence showed that the entries were made for the benefit of the defendant lumber company which paid the government price and all fees and expenses and gave each entryman a bonus on receiving a deed to his land. The court held that the same was sufficient to sustain the allegations of the bill and to entitle the complainant to the cancellation of all patents.

United States vs. Cooper, 220 Fed. 868.

This was a suit against a purchaser of land from a patentee to annul the patent and set aside the deed to defendant. It was held that where a patent to land had been secured by fraud and thereafter the patentee had conveyed the land to a third party, that while the land was beyond recovery by the government, a money judgment against the defendant with a lien on the land therefor was warranted by the prayer for general relief.

United States vs. Southern Pacific Co., 117 Fed.
545.

This was a suit to recover lands patented through error of the land department, or their value, when sold to bona fide purchasers. The complaint alleged that officers of the government in due and orderly course of proceedings, but misinterpreting the law applicable thereto, issued to the railroad company patents to certain tracts of land which the railroad company thereafter conveyed to bona fide purchasers. The court held that the fact that the error in issuing patents to the railroad company for lands to which it was not entitled under its grant was that of the land department constituted neither a legal nor an equitable defense to an action by the United States to recover such lands or their value when sold to bona fide purchasers. We quote from the opinion:

“That the government title to the lands thus patented to the defendant railroad company thereupon passed to that company is not questioned and it is equally clear that under the decisions herein cited the title was erroneously so conveyed and wholly without consideration. The right of the government, the real owner of the land, to maintain in a court of equity, a suit to set aside such conveyance and re-establish its title, cannot be doubted.”

It will be seen that the courts have heretofore not hesitated to grant redress to the government when patents were issued through a misapplication of the law as in this instance. And where this error of the government was induced by the fraud of the defendant it is inconceivable that the government should be deprived of any redress and the defendant permitted to enjoy the fruits of his fraud.

The case of *United States vs. Southern Pacific*, 117 Fed. 545, was affirmed in 133 Fed. 651, where the opinion, in part, reads as follows:

“The railroad company received patents for lands under an erroneous interpretation of the law. It was a clear mistake and conveyed no rights or title whatever to the railroad company to any of the lands in question. The company sold a portion of the lands to bona fide purchasers. Not having any title to the lands and having received the money for the lands, it must be held responsible to pay the amount specified in the act.”

And to like effect is the case of *United States vs. Oregon and California Railroad Company*, 133 Fed. 954, which held that the United States has the right to have canceled patents to lands erroneously issued under a railroad grant, and also to recover from the grantee the government price of the lands so patented and sold to bona fide purchasers and a suit to enforce such rights may be maintained in a court of equity. This latter decision was affirmed in 144 Fed. 832.

In *Germania Iron Co. vs. United States*, 165 U. S. 379, it was held that if while disputed matters of fact concerning a tract of land or the priority of right of claimant thereto are pending unsettled in the land department, and patent erroneously issues for the tract through inadvertence or mistake, a court of equity may rightfully interfere to cancel the patent.

In *Williams vs. U. S.* 138 U. S. 514, the court said:

“If through inadvertence and mistake, a wrong description is placed in a conveyance of real estate by an individual, a court of equity would have jurisdiction to interfere and restore to the party the title which he never intended to convey and it has a like jurisdiction when a wrong description from a like cause gets into a patent of public land. If the allegations of a bill point to fraud and wrong, and equally to inadvertence and mistake, and the latter be shown, the bill is sustainable although the former charge may not be fully established.”

In *Southern Pacific Co. vs. United States*, 200 U. S. 341, it was held that the right of the United States to avoid and annul patents erroneously issued by the land department by bill in equity is sustained by an unbroken line of authority.

These few citations must be eloquent proof of the attitude of the courts with regard to patents obtained through error of the land department. It has ever been ready to accord prompt relief in such cases and has not restricted it to any one remedy. It sanctioned all the remedies at its disposal. To deny relief in such cases would be to open the door to many possibilities of wrong if the innocent or unintentional error or omission of the officers of the land department can be operated to deprive it of its appropriate jurisdiction; it affords too strong an inducement for an intentional omission, proof of which may well be beyond the power of the government. No reason can be offered why one who parts with no consideration, gives nothing in return and receives valuable land from the government through a misinterpretation of the law, should be permitted to take advantage of another's error, particularly when the result of such error may deprive honest homesteaders of the merited beneficence of the government. The courts are no less prompt to grant relief in cases where patents are

secured through fraud and misrepresentations, and thus in a measure endeavor to avoid encouragement of fraudulent and deceitful practices. To shut one's eyes to the conduct of the defendant and to refuse relief to the government would be to put a premium on fraud.

Where both the error and omission of the land department and the fraud of the patentee are present as in the case at issue, the right of the government to pursue any appropriate remedy at its disposal to obtain redress would seem to be unquestioned. It has in this case elected to ratify the patents and sue for the value of the lands. The defendant now attempts to defeat recovery by stating that the fraudulent representations were immaterial. It thus becomes necessary to discuss at some length the elements of fraud, particularly with regard to the subject of materiality and rules and citations governing the same.

I.

IN AN ACTION FOR FRAUD AND
DECEIT FALSE AND FRAUDULENT
AFFIDAVITS AND PROOFS RESPECT-
ING THE PURPOSE FOR WHICH THE
ENTRIES FOR HOMESTEAD WERE
MADE AND THE TERMS OF RESI-

DENCE MAINTAINED, AND THE AMOUNT OF CULTIVATION AND IMPROVEMENT PERFORMED UPON THE LAND ARE MATERIAL WHEN RELIED UPON, THOUGH UPON A CORRECT APPLICATION OF THE LAW THE PROOF AS TO THE TERM OF RESIDENCE SHOWED THAT THE ENTRYMEN WERE NOT ENTITLED TO PATENTS.

The gist, the intrinsic ingredient of this action, was the fraudulent scheme—the false representations of this defendant, through inducing the entrymen to make fraudulent entries and proofs under the homestead act, whereby the defendant was deceived and induced to part with title to valuable tracts of land. In brief, it is alleged that the defendant, for the purpose of defrauding the United States, induced certain persons named in the complaint to make homestead applications for lands within the former Siletz reservation subject to homestead entry, and then to make final proof showing:

(1) Residence; (2) Cultivation and improvement; (3) Non-alienation; and (4) Good faith; when in fact there had been no residence, no cultivation or improvement for the period required by law; the lands had been the subject of contract for the purpose of alienation to

the defendant; the entrymen had throughout acted in bad faith, had no intention of ever becoming homesteaders and thereby had flagrantly violated the beneficent policy of the government.

It therefore appears that the entrymen obtained their patents from the government by fraud and perjury. There is no crime more destructive of morals and good government than that of perjury. But, contends the defendant, upon the face of the proof it appears that the land department erred in the issuance of the patents, for in no instance was there any proof offered that the entrymen had actually resided upon the lands the three years period required by law, and that thereby the representations made were immaterial. It may be conceded that the land department believing that the entrymen by reason of their military service was entitled to a period of commutation from the time of residence as authorized under other homestead acts, erred in that respect for the act under which these lands were thrown open to settlement made no provision for commutation.

(a) But even with the allowance erroneously made for military service a period of actual residence was necessary and the proofs as to this residence were false and fraudulent.

(b) An erroneous allowance of military service in place of actual residence does not render the fraud and deceit immaterial;

(c) Military service alone would not have entitled the entrymen to patent; and

(d) The homestead law was further violated by the entrymen making the entries not for their own exclusive use and benefit but for the benefit of a third party and not for the purpose of actual settlement and cultivation.

There certainly can be no dispute as to requirements necessary to be met before patent issues. When the several entrymen made their proofs, it was necessary for them to make certain statements upon the truth of which depended their right to patent. Even with the erroneous allowance for military service the government demanded proof of the fulfillment of certain other requirements. The fact that the entrymen were veterans of the Civil War and thereby entitled in certain cases to commutation would not in itself have induced the land department to have issued patents. First of all it was necessary to make proof of some period of actual residence. Such proof was submitted and it was false and fraudulent. Without this proof no patents would have been issued irrespective of the military service of the entrymen.

Secondly, it was necessary to make proof of substantial cultivation and improvement of the land. Such proof was submitted and it was false and fraudulent.

Thirdly, it was necessary to make some proof that the entries were made for the exclusive use and benefit of the entrymen and for the purpose of actual settlement and cultivation and that the land had not been alienated. All of such proof was submitted and it was in all respects false and fraudulent; therefore, it must be quite apparent that the military service which was erroneously allowed was in itself not sufficient to authorize the issuance of patents. The patents would not have been issued but for the false and fraudulent representations made as to the other essential requirements as well. How then, can it be said that the military service alone, even though an error was made in its allowance, could have been the sole and inducing cause to the issuing of the patents?

We may concede at the outset that in order to constitute fraud the false representations must be as to material facts. What are material facts are not always susceptible of a fixed rule. In determining what is a material fact one must take into consideration a number of circumstances. The circumstances in which fraud is accomplished are so varied and the character of the mis-

representations so widely different that it is unwise to attempt to enunciate with precision a general rule or standard by which all cases can be governed. Courts and legislatures do not attempt to define with exactness what shall constitute fraud in all cases. Should they do so, unscrupulous ingenuity would devise some other method of committing it and then claim that what was done was not within the definition. It is therefore left to be found from all the facts and circumstances of each particular case.

SMITH ON FRAUD, SECTION 61, says that A REPRESENTATION IS MATERIAL WHEN BUT FOR IT THE CONTRACT WOULD NOT HAVE BEEN MADE.

This definition seems to be most apropos to the case at hand, and must of a certainty answer all the arguments that defendant can be ingenious enough to advance in support of his unlawful venture. It is apparent that the Government was deceived and beguiled into issuing patents which it would not have done but for reliance upon the wilfully false statements of the entrymen made to induce their issuance. It cannot be doubted that the falsity of the statements operated to the prejudice of the plaintiff and was a matter of inducement, thereby being material.

Therefore, applying this definition found in the text book of *Smith on Fraud*, which seems to be the most frequently cited and approved, being succinct and expressive, it is not difficult to declare that all of the representations made by the entrymen are material in that the one representation as to residence, even under a correct application of the law was not and could not have been the sole or even the predominant inducement to the issuance of the patents. Furthermore where there is an aggregate of inducements as in this case, it is not possible for any man to determine whether the result would have been attained with some of the inducements wanting.

Where such a state of facts exist, the Court will promptly give redress to the injured party. It is enough that the representations materially caused the conduct of the plaintiff, although (being combined with other motives) they were not the sole or even predominant inducement to the party's action. If a man resort to unlawful means to accomplish an unlawful purpose, the law will not stop to measure the inducement.

We submit the following authorities in connection with our proposition that the false representations made were material, that they were relied upon and were intended to operate and did operate as one of the inducements to the issuance of patents.

The rule as laid down in *12 Ruling Case Law*, p. 297, is as follows:

“To constitute fraud in any case, the facts misrepresented or concealed must have been material facts and they must also substantially affect the interests of the persons alleged to have been defrauded. A fact is material when it influences a person to enter into a contract, or when it deceives him and induces him to act, or when without it the transaction would not have occurred. It is broadly stated therefore that the representations must have operated as an inducement to the making of the contract in question. That is, must have influenced the mind of the party to whom they are made in making the contract or fixing its terms. If he would have done so as readily had he been apprised of the facts, then he has not been defrauded. It has been declared, however, that whether the complaining party would have made the contract but for the representations, is not the test of his right, since that is often a mere speculative inquiry and that if the false representations were material and relied upon and were intended to operate and did operate as one of the inducements to the contract, it is not necessary to inquire whether the plaintiff would or would not have made it without this inducement.”

At page 301 it is said:

“It has been held, however, that the representations need not relate directly to the nature and character of the subject matter of the contract, but that it is sufficient if they are so closely connected with the contract that the parties would not, but for the representations, have entered into it and were in-

duced to enter into it to the knowledge of the other party by such representations.”

As stated in *White Sewing Mach. Co. vs. Bullock*, 76 S. E. (N. C.) 634:

“False representations inducing a contract are material if the contract would not have been made but for such representations.”

The subject as treated by *Bigelow on Fraud*, Vol. I, p. 544, is stated as follows:

“It is not necessary to prove that the plaintiff relied solely upon the defendant’s representations. It is sufficient that the representations were relied upon by the plaintiff as constituting one of the substantial inducements to his action. It is indeed sometimes said that the false representations must have been such that without them the transaction complained of would not have taken place. But it has well been said it is not possible for any man in the aggregate of inducements which led to the transaction to determine whether the result would have been attained with some of the inducements wanting. Nor should the guilty party be permitted to allege in excuse that the innocent party might have acted as he did if less deceit had been practiced upon him. If a man resort to unlawful means and accomplish an unlawful purpose, the law will not stop to measure such inducements. If, for example, a party induced by the several false and fraudulent declarations of two persons different in time and character purchases worthless property, it would not do to say that because the trade might not have been made if only one falsehood had been practiced and the purchase

not wholly induced by either, the party injured is without redress. If the fraud be accomplished and the unlawful acts of the defendant contributed thereto he is answerable. The fraudulent acts of the defendant must indeed have worked an injury but if the wrong has been done and the defendant has been a party to its commission, the court will not apportion the penalties of guilt among offenders nor divide the spoil among highwaymen."

In *American and English Ency. of Law*, Vol. 14, p. 62, it is said:

"It has been held, however, that either party may make a collateral statement made by the other party during the negotiations as to the existence or non-existence of a particular fact a material one in his own judgment, so that if it turns out to be untrue and was falsely and fraudulently made it will vitiate the contract if he relied upon the same as true and would not have entered the contract but for such statement. In other words, a contract may be avoided because of the false and fraudulent representation though not relating directly to the nature or character of the subject matter if it is so closely connected with the conduct as that the party relying upon it would not, but for the representation, have entered into it, and if he was induced to enter into it to the knowledge of the other party by such representation."

In the case of *Lane vs. Harmony*, 112 Me. 25, it was held:

"If fraud is set up it must be material, relate distinctly to the contract and affect its very essence

and substance, and while there is no standard by which to determine whether the fraud be material or not, the rule is that if the fraud be such that had it not been practiced the contract would not have been made or the transaction completed, then it is material."

In the case of *James vs. Hodsdon*, 47 Vt. 127, the court held that if a vendor's fraudulent representations constituted one of the inducements to the purchase, it was sufficient to avoid the sale. We beg the indulgence of the court to quote somewhat fully the opinion in this case, as we believe it is pertinent to the question here involved.

"The charge of the court 'that it was not necessary that they should find that the plaintiff relied solely upon the representation but it was sufficient for them to find the representations were so far relied on by the plaintiff as to constitute one of the inducements to the trade in question' we think sound and reasonable. Under the charge the jury must have found that the plaintiff was deceived and defrauded. That he was in fact cajoled into the purchase of the patent right of no value and giving his notes for a large sum by the false assertions of the defendant and his conspirators. It is often said that the false representations must have been such that without them the trade would not have been made, but it is never possible for any man in the aggregate of inducements that effected the sale to determine whether the result would have been attained with some of the inducements abated, nor should the guilty party seeking the benefit of the

sale and induced in a measure by his fraud and falsehood be permitted to allege in excuse that the innocent party might have been made the purchase if the defendant practiced less deceit and his lies had been less flagrant. If he resorts to unlawful means and accomplishes a fraudulent purpose the law will not stop to measure the force of such inducements. It is enough that the party was deceived and cheated and the defendant's falsehoods and fraudulent practices contributed to that end. A misrepresentation must be something material in which the party relies and puts confidence and is misled and cheated (1 Story Eq. 197, 203). If the party induced by the several false and fraudulent declarations of two persons different in time and character, purchase worthless property, it would not do to say that because the trade might have been made if only one falsehood had been made and the purchaser not wholly induced by either, therefore, he is without remedy or redress. If the fraud is accomplished and the unlawful acts of the defendant contributed thereto he is answerable. The fraudulent acts of the defendant must indeed have worked an injury, but if the wrong has been done and the defendant is party to its commission the court will not apportion the penalties of guilt among offenders nor divide spoils among highwaymen."

In *Safford vs. Grout*, 120 Mass, 20, the head note reads as follows:

"In an action for false representation it is sufficient if such representations materially influenced the conduct of the plaintiff, though they were not the sole or predominant inducement. It is enough if they had material influence upon the plaintiff although combined with other motives."

It is stated in *Bigelow on Estoppel*, Sixth Edition, page 646, that while the representation must be material, this does not mean that the representation in question must have been the sole inducement of the change, or the change of position, if it were adequate to the result. Thus if it might have influenced the conduct of a prudent man, that would be enough, though other inducements operated with it, and the law will not undertake in favor of the wrong-doer to separate the various inducements presented and ascertain how much weight was given to the representation in question.

There accordingly seems to be no dearth of authorities holding that while as a general proposition of law the representations must be material, yet where the contract or transaction is induced by a number of representations, the court will grant redress without stopping to measure the inducements and determining the particular one which prompted the contract. As has been made clear in this case, the representation as to residence could not have been and was not the sole and inducing cause, to the issuance of patent. Even with the military service erroneously allowed proof of some actual residence was essential. Proof of good faith was essential; proof of non-alienation was essential, all of which by reason of their falsity contributed to the issuance of the patent.

A different situation might have presented itself had patent been issued solely because of the military service of the entrymen, and it was the sole and inducing cause, but no such situation was presented by the pleadings, and no such contention has been or can be made.

II.

ONE WHO HAS EFFECTED HIS PURPOSE THROUGH A FRAUDULENT MISREPRESENTATION CANNOT DENY ITS MATERIALITY.

It does not lie in the mouth of Jones and of the entrymen to now declare that the fraudulent representations were immaterial. It is sufficient to say that they were relied and acted upon and that they were fraudulent and were made with the intent to deceive and defraud the government. So states *Bigelow on Fraud*, volume I, p. 497:

“A party who has effected his purpose through a misrepresentation cannot deny its materiality.”

To permit defendant to invoke the rule as to materiality in spite of his active efforts to conceal the true condition of affairs, to thwart investigation and inquiry, would be to encourage fraudulent and deceitful practices.

In *Strand vs. Griffith*, 97 Fed. 854, it is held that a seller who practices fraud and deceit to induce a purchaser to accept goods without examination which he would otherwise have made, would not be heard to say in defense to an action for fraudulent representation that the plaintiff was cheated as a result of his own negligence and credulity, and is therefore without remedy. That as between original parties, one who has intentionally deceived the other to his prejudice is not to be heard to say in defense of the charge of fraud that the innocent party ought not to have trusted him. The very representations relied upon may have caused the party to desist from inquiry and neglect his means of information.

In *Autle vs. Sexton*, 137 Ill. 410, the court said:

“Where a misrepresentation is made as to a material fact and such misrepresentation is made knowingly and for the express purpose of deceiving and defrauding, and the injured party relies upon the statement made and under circumstances which would induce a reasonably prudent man to so rely, there must be a right of action at law for fraud and deceit. To throw a purchaser out of court in such a case upon the plea he did not avail himself of the means of knowledge open to him would be offering a premium on fraud and would be destructive of confidence in business transactions.”

In *Dodge vs. Pope*, 93 Ind. 480, the rule is laid down as follows:

“Where one with knowledge of his rights and of the facts makes a statement to another to induce him to act in a given way and the statement produces the effect designed and causes the person who acts upon it to part with value, he by whom the statement was made cannot afterward be heard to deny its truth.”

In *Dezell vs. Odell*, 3 Hill. 215, the court said:

“We then have a very clear case of an admission by the defendant, intended to influence the conduct of the man with whom he was dealing and actually leading him to a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This I understand to be the very definition of an estoppel in pais.”

In *Fargo Gas Light & Coke Co. vs. Fargo Gas & Elec. Co.*, 37 L. R. A. 593, the court held that one who buys property has a right implicitly to rely upon representations of the seller, and if they were false and made with the intent to deceive the purchaser, the seller will not be allowed to urge that the buyer by investigation could have discovered their falsity. We quote from part of the opinion:

“That would indeed be a strange rule of law which when the seller had successfully entrapped his victim by false statements and was called to account in a court of justice for his deceit would permit him to escape by urging the folly of his dupe for not suspecting that he, the seller, was a knave. * * *

The unmistakable drift is toward a just doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim."

In *Linnington vs. Strong*, 107 Ill. 302, it is held:

"As between the original parties when it appears that one has been guilty of intentional and deliberate fraud by which the other has been misled and influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable care and intelligence."

In *Reynell vs. Sprye*, 1 DeG. M. and G., 710, 21 L. J. Ch. N. S. 663, it is held:

"Where one party has intentionally misled the other it is no answer to the imputed fraud to say that the party alleged to be guilty of it recommended the other to take advice or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made yet that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of the things he himself has stated."

In *Brent vs. Lilly Co.*, 174 Fed. 877, it is held:

"A party who has induced another to act on a certain understanding cannot, after the other has acted, deny that understanding to the other's loss."

In *Warder vs. Ehitish*, 77 Wis. 430, 46 N. W. 540, the court says:

“A person cannot procure a contract in his favor by fraud and then bar a defense to a suit on it on the ground that had not the other party been so ignorant or negligent he could not have succeeded in deceiving him.”

In *Tooker vs. Alston*, 159 Fed. 599, it is held:

“In an action for fraud and deceit inducing a purchase of property it is not a defense that plaintiff made other investigations and inquiry respecting the property if the fraudulent conduct of defendant was a material though not the sole inducement of the purchase.”

It would seem, therefore, that the great weight of authority is in support of the just rule that however negligent the party may have been to whom the false statements have been made, yet that is a matter affording no ground of defense to the other. No man should be heard to complain that another has too implicitly relied upon the truth of the things he has himself stated. While a rule may be found in some cases favorable to the defendant's theory of the law, yet no decision can be found which establishes a doctrine under which a party would be bound under all the circumstances such as has developed in this case to make any investigation or inquiry touching the truth or falsity of the statements made.

There are many cases which sustain the view that the plaintiff had the right to rely implicitly upon the representations made by the entrymen with respect to the requirements prerequisite to patent. We are aware that cases may be found which exact from one more care in ascertaining the truth or falsity of representations. In determining what the courts in such cases intend to hold, the language of each opinion must be read in the light of the facts of the particular case. Cases should be decided as they arise, keeping in view the general principle that courts will not readily listen to the plea that the defrauded party was too easily deceived. It is a just doctrine which asserts that persons engaged in fraud are not the objects of the special solicitude of the courts.

III.

WHERE THE EXISTENCE OF FRAUD
DEPENDS UPON A VARIETY OF CIR-
CUMSTANCES THE MATTER OF MA-
TERIALITY OF REPRESENTATION IS
FOR THE JURY AND NOT FOR THE
COURT.

By a long line of cases, questions of fraud are peculiarly within the province of the jury to be determined

from all the facts and circumstances of the case. While it may be true in certain cases the court is empowered to interpret language of a perfectly plain nature unaffected by external facts, yet where there are facts and circumstances, as in this case, from which a jury might have reached a conclusion that the representations were adequate to, and did in fact, induce the issuance of the patents which would not have been issued but for such representations, it was error for the court to refuse to submit same for the consideration of the jury.

In the case of *Patten vs. Field*, 81 Atl. 77 (Me.), it is held:

“That whether the elements of actionable deceit existed in an action therefor were questions of fact to be determined from the evidence and the inferences to be drawn from the facts established.”

In the case of *McNaughton vs. Smith*, 91 Minn. 140, it is held:

“Where the existence of fraud depends on a variety of circumstances arising from motive and intent and inference from circumstantial evidence, the court should submit the question to the jury with proper instructions concerning the tests of fraud.”

In the case of *Mosby vs. McKee*, 91 Mo. App. 500, it is held:

“Although fraud cannot be predicated on mere conjecture, still every slight circumstance will warrant the submission of the issue involving it to the jury, especially if it may be inferred from all the facts and circumstances.”

In the case of *Southern Commission Co. vs. Porter*, 122 N. C. 692, it is held:

“Where a transaction bears such evidence of fraud that it might be properly inferred it is error to refuse to submit the question to the jury.”

In *Simon vs. Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, it is held:

“The question whether a representation made was fraudulent is a question of fact to be determined by the jury.”

That the question of materiality is for the jury is supported by the following cases:

Fottler vs. Moseley, 179 Mass. 295.

Hawley vs. Wicker, 117 N. Y. App. Div. 638.

Kehl vs. Abram, 210 Ill. 218.

The case of *Fottler vs. Moseley*, 179 Mass. 295, was an action for deceit wherein it was alleged that relying upon the false and fraudulent representations of the defendant, a broker, that certain sales of stock were genuine transactions, the plaintiff revoked an order for the

sale of certain shares of that stock held for him by the defendant, whereby the plaintiff suffered loss. It was contended by the defendant that the representations were not material, that the false representations to be material must not only induce action but must be adequate to induce it by offering a motive sufficient to influence the conduct of a man of average intelligence and prudence and in this case the representation complained of so far as it was false was not adequate to induce action because the fictitious sales were so far and distant in time and that therefore it was not material. The court held:

“A corporation may be so small and of such a nature and have so slight a hold upon the public, and the number of its shares may be so small and the buyers so few that the question of whether certain reported sales are fictitious may have a very important bearing upon the action of such a man. Upon the facts in this case, I cannot say as a matter of law that the representations so far as false were not material. This question is for the jury who are to consider it in the light of the nature of the corporation and its standing in the market and other matters including such as those of which I have spoken.”

In the case of *Hawley vs. Wicker*, 117 N. Y. App. Div. 638, it was contended that the representations made by plaintiff were expressionless of opinion, and were immaterial. The court held that it could neither be main-

tained as a matter of law that they were mere expressions of opinion, nor that they were immaterial representations. That the jury would have been justified in finding that the representations concerning a certain matter were material representations; that it was false and that it was one of the inducements which led to the contract.

In the case of *Kehl vs. Abram*, 210 Ill. 218, which was an action for damages for deceit, it was insisted that the court erred in one of its instructions to the jury that if a party dealing with another makes use of fraudulent statements, representations and acts with respect to the material inducement of the transaction, etc., such party cannot afterwards be heard to say that the party with whom he was dealing was misled, etc., and it was contended that it was error to have mentioned "material inducement" without defining such term; that what is material inducement is a question of law and not of fact. The court, in its opinion, held:

"I think there is a broad distinction between material allegations of a declaration and material inducements of a party entering into a transaction. A declaration is strictly a legal term and one not versed in legal phraseology would not be supposed to be able to determine what are the essential or material parts of a declaration but a jury are supposed to be as well acquainted with human nature as the

judge who instructs them and know as well the things that prompt individuals to action and it is peculiarly their province to say what are or what are not material inducements in a transaction where one party claims to have been overreached and deceived by the alleged false conduct of another against whom redress is sought. If the jury are of the opinion that the alleged false statements were of no consequence in causing the plaintiff to act as he did it is their duty to find in favor of the defendant, otherwise against him. This principle is recognized and applied in the law governing insurance policies and in actions upon such the jury may be instructed that if the statements made to secure the policy have been fraudulent and are material then the policy may be avoided, but where the statements though not correct have not been material in inducing the issuance of the policy, then the same is not to be avoided and in such cases the question of the materiality is left to the determination of the jury."

To like effect are the following:

Sharp vs. Ponce, 74 Me. 470.

"To determine whether the representation made was of material facts or not was a question for the jury, and not for the court.

Newhall vs. Pierce, 115 Mass. 457.

"The question whether or not the concealment was of a material fact was one of fact for the jury."

Irrespective of the authorities cited in support of the contention that the question of materiality of representa-

tions was for the jury, it is apparent that this rule is founded on good reason. Where a number of representations are made as in this case, it certainly would be usurping the province of the jury for the court to declare as a matter of law that certain representations were immaterial. What might have been the motive of the party to whom such representations were made in entering into the contract, is best known to that party himself. What might have been inducement to one may not have been an inducement to another. It would therefore follow that the jury, composed of men supposed to have a peculiar knowledge of the foibles and imperfection of mankind, would be in a better position to judge as to whether or not certain representations were material and were the inducing cause to the contract.

THE WELLS ENTRY.

A different situation is presented with regard to the Wells entry. Wells made application October 1, 1900, and commuted May 26th, 1902, by the payment of the original price of \$1.50 per acre. It is conceded that under the provisions of Section 2301 R. S. Wells was entitled to commute on making proof of settlement and residence and cultivation for a period of 14 months. It is contended that the Act of August 15, 1894, requires

actual residence, and it is claimed by defendant that inasmuch as the proof submitted by the entryman Wells, of residence upon his entry, showed his actual presence upon the land for a total of no more than ten weeks, that the patent should not, as a matter of law, have been issued to him, and therefore the government knowing the law and the requirements thereof had no right to rely upon the representations of Wells, and consequently no action for deceit can lie.

After the passage of the Act of May 17th, 1900, which repealed that portion of the act which required payment of \$1.50 per acre for the lands in question, a second act was passed, being that of January 26th, 1901, extending the right of commutation to these lands upon the payment of the original price of \$1.50 per acre. The commutation section of the revised statutes, Section 2301, was extended to this entry. Said section reads as follows:

“Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of Section 2289 from paying the minimum price for the quantity of land so entered at any time after the expiration of 14 calendar months from the date of such entry upon making proof of settlement and residence and cultivation for such period of 14 months.

It will thus be seen that a commuted entry, by the payment of the minimum price, is governed by this section, and not by the act of 1894. The Wells entry was therefore such a commuted entry, and cannot in any wise be affected by the act of 1894, which contemplates a different character of residence where no commutation is made. It is specifically stated in Section 2301 that commutation shall be allowed upon the payment of the prescribed price after making proof of settlement, residence and cultivation for 14 months. It would be a strained construction of this statute to now disregard the common understanding of the character of residence contemplated by this section, by declaring that such residence must be "actual." We do not believe that defendant will make such a contention but will base his argument upon the proposition that notwithstanding that this entry was commuted, it must comply with the character of residence demanded by the act of 1894, and not by that of Section 2301 R. S. This, however, we think untenable, and not justified by the state of facts here presented.

It is submitted that the question of residence is largely one of bona fides and not one of actual presence for any length of time on the entry. If, as is alleged in the complaint, and not denied in the answer, Wells during

the period of 14 months covered by his final proof, maintained his home and actual residence elsewhere than on his entry, the proof, even though showing his actual presence upon the land for every day of the 14 months would nevertheless fail to comply with the requirements of the law. On the other hand, if the fact that Wells was making the entry his *home*, to the exclusion of any other, and with a bona fide intention of so doing during the entire 14 months covered by his proof, he might under certain circumstances lawfully be absent therefrom practically the whole of the time and yet his proof be good. So far as the Government is advised and has been able to determine, this has been the invariable rule of the Department of the Interior in passing upon proof submitted in homestead entries, and is the only rule by which the question of compliance by the entrymen with the law requiring residence may be determined.

Furthermore, as has been shown, entry was not made entirely under the strict provisions of the Siletz law, as was done in the case of the other eight entrymen, but was made in accordance with the provisions of the act authorizing commuted entries, which permitted constructive residence. In other words, where no commutation was authorized, three years actual residence appears to have been required, yet, where it was authorized, there

seems to be no good reason why the method of commutation should be changed, modified or enlarged from that provided for in Section 2301 R. S. By a common sense construction of the latter requirements, no actual presence upon the land is essential. The character of residence required thereby is dependent entirely upon the good faith of the entrymen. It would thus appear from the opinion to be found in the case of *Waley v. Northern Pacific Railroad Company*, 167 Fed. 565, approving the court's ruling in the case of *U. S. Richards*, 149 Fed. 445,

“To establish a residence under the Homestead Law, there must be a combination of act and intent—the act of occupying and living upon the claim and the intention of making same a home to the exclusion of a home elsewhere.”

It therefore appears that so far as the Wells entry is concerned the court plainly erred in granting judgment upon the pleadings as to him, for the Government was required by law to issue patent upon the submission of his proofs, the statements therein having been relied upon by the Government as true. There having been a showing that the requisite term of residence had been maintained, in reliance upon which patents were issued, it was error of the court to hold that the false and fraudulent proofs submitted in support of the Wells entry were immaterial.

IN CONCLUSION.

It cannot be that the law will sanction the deliberate, unconscionable fraud of defendant without exacting retribution. For the government to fail to take all the remedies at its disposal to protect the public rights invaded by the defendant would be to breach its sacred trust. Its action for deceit was instituted to that end, being the only remedy left to the government. The law recognizes principles on which it may be supported. The principle on which it is contended to rely is that wherever deceit or falsehood is practiced to the detriment of another the law will give redress. The fraud is that the defendant induced the entrymen to make false representations which he and they knew to be false, whereby the government parted with title to valuable tracts of land. Here then is the fraud and the means by which it was committed.

It is an elementary principle of fraud that when one makes a false representation, knowing it to be false, with the intent to induce another to make or enter into a contract which but for such representation would not have been entered into, and the plaintiff has been damaged, a clear case of fraud is made out.

All the elements of actionable fraud and deceit are present in the case at issue. The entryman made false representation as to all the requirements prerequisite to patent which were made with the intent to deceive and defraud the plaintiff. They were acted and relied upon to plaintiff's damage, *and but for such representations the patents would not have been issued*. True as to one of the inducements, the land department erred as a proposition of law, and while such patents might not have been issued had such error not intervened, neither can it be gainsaid but that the patents would not under any circumstances have been issued had not the fraudulent proofs been submitted.

In homestead entries such as in this case, the sole consideration required by the government consists of residence and cultivation of the lands *in good faith*, and where such consideration was not given, but instead it was falsely represented that the same had been made, the government is defrauded of the value of the land.

First. The lands could not be secured in any event except by some proof of period of actual residence. In other words, they were given to the entrymen in consideration of improving and developing the land itself and incidentally the community. While the proof as to

the required term of residence is insufficient as a matter of law, yet even with the allowance erroneously made for military service, a period of actual residence was necessary. There was proof of some period of residence, and the proof as to this residence was false and fraudulent. Furthermore, the proof of residence could not under the express requirements of the homestead act, have been the sole, proximate or inducing cause to the issuance of patents, and therefore, how can it be said that the remaining representations were immaterial, if they were just as important and essential as the proof of residence?

Secondly. The Siletz act was violated by the entrymen making the entries for the benefit of the third party. If these things are true, then it cannot be comprehended how the military service would have entitled the entrymen to have taken the lands for the benefit of Jones, and therefore how can it be said that the erroneous allowance of military service would have rendered the fraud and deceit in this particular immaterial?

The homestead is a gift of the government to the homesteader, conditioned upon his occupation for a certain period of years, and upon his making no disposition of alienation during such term. The affidavit of non-

alienation is as clear an expression of the legislative intent as a direct prohibition. The policy of the government in this respect would be thwarted if the homesteader were permitted to alienate the land prior to the expiration of the prescribed time, or contract for such alienation for a fraudulent purpose. A successful alienation could only be accomplished by perjury, and an attempted alienation could only afford a constant inducement to the homesteader to abandon his occupation of the land. Therefore, the beneficent policy of the government would be set at naught, were the conduct of the defendant to go unpunished.

It must be apparent that the application for homestead was made in bad faith, was tainted with fraud, and for the purpose of assisting and aiding the defendant. Plainly, the entrymen had no intention of ever becoming homesteaders. The whole transaction was a scheme or conspiracy on the part of the defendant, to fraudulently obtain the ownership of these lands from the United States. There can be no question of the fraud and its misleading effects on the officers of the government. The very representation as to some actual residence which was relied upon by the government officials caused them to desist from inquiry, and neglect their means of information.

Surely, the law will not reward dishonesty and falsity. Surely deception, artifice, trickery and unfair dealing will not be allowed to operate as a shield and protection to the deliberate frauds and cheats of sharpers. No stronger case has been found, where reason demands the adoption of the rule that one who has effected his purpose through fraud cannot deny its materiality if relied upon to the other's injury. It should not, it cannot, lie in the mouth of the defendant to say the representations were immaterial. He who is a fraud and a cheat certainly cannot escape from liability by asking the law to applaud his fraud and condemn his victim for its credulity. No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance too trusting, too credulous and too relying upon honesty and fair dealing in those who part with nothing and attain a gift. For, after all, this valuable land was the gift of the government and this has been its reward.

With the hope that this brief may be of assistance to the Court it is respectfully submitted.

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IN THE
United States Circuit Court of Appeals⁷
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
PLAINTIFF IN ERROR

VS.

WILLARD N. JONES
DEFENDANT IN ERROR

Brief of Defendant in Error

UPON WRIT OF ERROR
TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

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United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff in Error,

v.

WILLARD N. JONES,

Defendant in Error.

Brief of Defendant in Error

*Upon Writ of Error to the District Court of the
United States for the District of Oregon.*

STATEMENT

This is an action to recover damages for fraud and deceit alleged to have been practiced by the defendant in securing the issuance of patents to certain persons in the complaint mentioned, to certain lands within the limits of the Siletz Indian Reservation. It is averred in substance that the defendant, for the purpose of defrauding the United States, caused certain persons named in the complaint to make homestead entries on lands within said reservation, and later to make final proofs showing residence and cultivation for the period required by law, when in fact it is alleged there had

been no residence or cultivation within the meaning of the law.

Defendant by his answer put in issue the allegations of the complaint and then set forth four separate affirmative defenses, namely:

The first affirmative defense is a plea of good faith on the part of the defendant.

The second affirmative defense is that the cause of action accrued more than six years next prior to the filing of the complaint. In connection with this defense it should be stated that the defendant first demurred to the complaint on the same ground urged in this defense, but the demurrer was overruled, the opinion of the Court thereon being reported in 218 Fed. 973.

The third affirmative defense, after averring that the several tracts of land were subject to entry and were entered as homesteads under the Act of Congress of August 15, 1894, avers that no one of the entrymen in making his final proof represented or testified that he had resided upon the land for a period of three years, and then sets forth the testimony given on the making of the final proof, in which it appears that no one of them claimed to have resided on the land for more than one and one-half years, some of them only claiming to have resided on the land one year. As to all of the entrymen excepting the entryman Wells, proof of military service was made for the purpose of supplying the deficiency of residence and occupation. As to Wells,

his entry was commuted, but the answer sets forth the final proof submitted by him, from which it appears that he only testified to having actually resided on the land ten weeks, whereas the law requires fourteen months' actual residence.

The fourth affirmative defense goes to the measure of damages. It avers that the Entryman Wells paid \$240.00 to the Government in commutation of his entry. It is also averred in this defense that the several tracts of land in the complaint described were, prior to the commencement of the action, sold to certain named purchasers who paid full value therefor and took the same in good faith and without any notice of the alleged frauds or deceits.

DEFENDANT'S CONTENTIONS.

Defendant's contentions are:

1. It being conceded that the entrymen, in their final proofs, did not claim to have resided on their respective entries the period required by law, it was immaterial whether the representations they made respecting settlement for a shorter period were true or false. This contention being based on the proposition that a false representation, to be actionable, must be material, and such that, if true, would justify the party to whom it is made in acting on it.

2. The action is barred by the statute of limitations.

3. That for lands patented under the homestead law upon false proofs, the Government cannot re-

cover damages, its sole remedy in such case being a suit to avoid the patent. If, however, the Court should hold that damages may be recovered in such case, the minimum price is the limit of recovery.

BRIEF HISTORY OF THE LEGISLATION MAKING THE LANDS IN QUESTION SUBJECT TO ENTRY.

While it is conceded here, as it was in the Court below, by counsel for the Government, that the Act of Congress under which the entries in question were made does not authorize or permit credit for military service in lieu of residence, a brief history of the legislation may prove helpful.

The entries in question were made under the Act of August 15, 1894 (28 Stat. 286-326). This statute is entitled "An Act making appropriations for current and contingent expenses of the Indian Department, etc., and for other purposes." The Act throws open to settlement the lands of seven separate and distinct Indian tribes and contains various provisions respecting the sale and disposition of these several tracts.

The first lands dealt with are those of the Yankton Indians, and as appears at page 319, the provision respecting those lands is, that:

"The lands by said agreement ceded * * * shall be subject to disposal only under the homestead and townsite laws of the United

States, * * * *but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.*"

The next lands dealt with are those of the Yakima Indians, and the provision relative to the disposition thereof is found at page 321 and is as follows:

"And the land so ceded and relinquished is hereby restored to the public domain, subject to the land laws of the United States."

The next Indian lands dealt with in said Act are those of the Cœur d'Alene, and the provision relative to the disposition of such lands will be found at page 323 and is as follows:

"* * * The lands will be disposed of under the homestead and townsite laws, preference being given to those persons who were actual *bona fide* settlers at the date of the agreement, February 7, 1894; provided that in no case shall the price per acre fall below the minimum prescribed by law."

The next lands dealt with are the Siletz lands, being those in question. The provision for the disposition of these lands will be found at page 326 and reads as follows:

“Mineral lands shall be disposed of under the laws applicable thereto and the balance of the land so ceded shall be disposed of as further provided by law under the townsite law and under the provisions of the homestead law. Provided, however, that each settler under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of \$1.00 per acre, final proof to be made within five years from the date of the entry *and three years' actual residence on the land* shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.”

It may be mentioned in passing that the provision requiring the payment of \$1.50 per acre was subsequently repealed.

The next Indian lands dealt with are those of the Nez Perce Indians, and the provision respecting the disposition thereof will be found at page 332 and is as follows:

“ * * * The land so ceded * * * shall be opened to settlement by proclamation of the President and shall be subject to disposal only under the homestead, townsite, stone and timber, and mining laws of the United States.

* * * *But the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States shall not be abridged, except as to the sum to be paid as aforesaid."*

The next lands dealt with are those of the Yuma Indians, and the provision for the disposition thereof is found at page 336, as follows:

"That all lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain and shall be opened to settlement and sale by proclamation of the President of the United States and be subject to disposal under the provisions of the general lands laws."

The next lands dealt with are those of the Uncompaghre Indians, and the provision respecting the disposition thereof will be found at page 337 and is as follows:

"That the remainder of the lands of said reservation shall * * * be immediately opened to entry under the homestead and mineral laws of the United States. * * * Provided that after three years' actual and continuous residence upon agricultural lands from date of settlement, the settler may, upon full payment of \$1.50 per acre, receive patent for the tract entered."

It will be observed that the lands of seven different tribes were by the same Act opened up to settlement or to be otherwise disposed of, and that the terms, conditions and character of settlement in each case was specifically prescribed by law. In two instances it is specifically provided that "the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged," while in the provision relative to the disposition of the lands of the Siletz Indian Reservation, being the lands in question, it is specifically provided that "three years' *actual* residence on the land shall be established," etc., no provision whatever being made for allowance for military service. It may be material to here observe that in this Act the term "*actual* residence" is for the first time used in connection with homestead entries in Congressional legislation.

POINTS AND AUTHORITIES

I.

FALSE REPRESENTATIONS, IN ORDER TO
BE ACTIONABLE, MUST BE MATERIAL,
AND MUST BE SUCH THAT, IF TRUE,
PLAINTIFF WAS JUSTIFIED IN ACTING
AS IT DID.

Am. & Eng. Enc. of Law, Vol. 14, pp. 42-59;
Bigelow on Fraud, p. 139;

First National Bank of Elkhart v. Osborne,
 48 N. E. 256;
 Fernaux v. Sydney Webb, 33 Tex. App. 560;
 Russell v. Branhan, 8 Blackford, 304;
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 Prince v. Overholser, 75 Wis. 646;
 Slaughter's Adm. v. Gerson, 13 Wall. 385;
 Platt v. Scott, 6 Blackford, 389;
 Robins v. Hope, 57 Cal. 496;
 Kent's Com., Vol. 2, pp. 484-5 (4th ed.);
 Silver v. Frasier, 85 Mass. 382;
 Missouri-Lincoln Trust Co. v. Third Natl. B.
 of St. Louis, 133 S. W. 357;
 Hall v. Johnson, 2d N. W. 55;
 Marshall v. Hubbard, 117 U. S. 415.

II.

IT IS FOR THE COURT, AND NOT FOR THE
 JURY, TO INTERPRET LANGUAGE OF A
 PERFECTLY PLAIN NATURE, UNAFFECTED
 BY EXTERNAL FACTS.

Bigelow on Fraud, p. 139;
 First National Bank of Elkhart v. Osborne,
 48 N. E. 256;
 Fernaux v. Sydney Webb, 33 Tex. App. 560.

III.

DAMAGES CANNOT BE RECOVERED FOR
 FALSE REPRESENTATIONS INDUCING
 ISSUANCE OF PATENT FOR HOMESTEAD

ENTRY. IF IT BE HELD OTHERWISE, WE SUBMIT THAT THE MINIMUM GOVERNMENT PRICE IS THE UTMOST THAT CAN BE RECOVERED.

20 Cyc. 130;

Smith v. Boles, 132 U. S. 125;

United States v. Pitan, 224 Fed. 604;

Dinwiddie v. Stone, 52 S. W. 814;

United States v. Norris, 222 Fed. 14;

Johnson v. Culver, 19 N. E. 129;

McMillan v. Reaume, 100 N. W. 166.

IV.

THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

Am. & Eng. Enc. of Law, Vol. 19, p. 146;

United States v. Winona & St. Peter R. R. Co., 165 U. S. 464;

United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447;

Sharon v. Tucker, 144 U. S. 533;

Davis v. Mills, 194 U. S. 451 (48 L. Ed. 1067);

Louisiana v. Garfield, 211 U. S. 70;

United States v. Exploration Co., 190 Fed. 405;

Dorsey v. Phillips, 1 S. W. 667; 25 Cyc. 1020;

Steel v. Smelting Co., 106 U. S. 447;

Northern Pacific Ry. Co. v. Eli, 197 U. S. 1;

Southern P. R. Co. v. United States, 200 U. S. 342.

ARGUMENT**I.**

- (a). FALSE REPRESENTATIONS, IN ORDER TO BE ACTIONABLE, MUST HAVE BEEN MATERIAL, THAT IS TO SAY, MUST HAVE BEEN SUCH THAT, IF TRUE, JUSTIFIED THE PLAINTIFF IN ACTING AS IT DID.
- (b). THE QUESTION IS NOT WHETHER THE PERSON TO WHOM THE REPRESENTATION WAS MADE DEEMED IT MATERIAL, BUT WHETHER IT WAS IN FACT MATERIAL.
- (c). WHEN THE LANGUAGE IS PLAIN AND NOT SUBJECT TO MODIFICATION *ALL-UNDE*, IT IS FOR THE COURT TO DETERMINE WHETHER OR NOT THE REPRESENTATION WAS MATERIAL.

We shall argue these three propositions together. That they state the rule supported by the authorities, we are confident.

In Vol. 14, *Am. & Eng. Enc. of Law*, p. 59, it is said:

“To constitute fraud, the representations must be as to a material fact. With respect to this rule there is no conflict of opinion, except sometimes in its application. A representation in relation to a fact that is not material to a contract, though it may be false, and known to

be false by the person making it, and though it may be acted upon by the other party, is not fraud, either for the purpose of an action of deceit or for the purpose of rescinding a contract."

As we have seen, the statute under which the proofs were taken and the patents issued specifically required, as a condition precedent to the issuance of the patents, that the entrymen should have actually resided on the land three years. Therefore, proof that the entryman in any case had resided on the land one year, or one and one-half years, was immaterial, because, if true, it would not justify or furnish any excuse for issuing a patent. It was, therefore, immaterial whether the representation was true or false.

Suppose the entryman had falsely represented to the Government that he had actually resided on the land one week, and thereupon, and based on such proof, the Government had issued to him a patent, would that have been actionable deceit? We submit that the supposed case in nowise differs from the one under consideration.

Counsel for plaintiff contend, however, that whether or not a representation is material is a question for the jury. We submit that it may or may not be, depending entirely on the nature and circumstances of the case. Clearly, when it is agreed, as here, precisely what the situation and

representations were, it is for the Court to determine the materiality of the representations.

In *Bigelow on Fraud*, page 139, it is said:

“Again, concerning the elements which go to make up a case of fraud, it is for the Court and not for the jury to determine whether, *c.g.*, an inducement held out by one party to another, which the latter professes to have acted upon, is material or not. * * * Generally speaking, it is also for the Court to interpret language of a perfectly plain nature, unaffected by external facts such as the particular circumstances in which it is used; when so modified it is for the jury to declare its meaning, but when, as we have just said, the language is plain and not subject to modification *aliunde*, the case is for the Court; and this is true in principle whether the language be written or oral. There is no question of the truth of this proposition when applied to written language; and there should be none in regard to oral statement, for no sound distinction can be drawn between the two cases.”

As we have stated, the question is not whether the party claiming to have been defrauded deemed the representations material, but whether or not they were in fact material. Thus the rule is stated in *Am. & Eng. Enc. of Law*, Vol. 14, page 62, as follows:

“It has been said that fraud is material to a contract if the contract would probably not have been made if the fraud had not been practiced. This, however, is not always true. If a representation is not material, a person has no right to act upon it, and if he does, he is not entitled to relief or redress on the ground of fraud. The question is not whether the person to whom the representation was made *deemed it material*, but *whether it was in fact material*.”

Now the alleged false representations in the case at bar consisted of a showing to the effect that the entrymen had resided on the lands from one to one and one-half years. This showing is entirely in writing, consisting of the final proofs of the entrymen. They are set forth in the answer and are admitted by the reply. Under the statute it was requisite for each entryman to prove that he had actually resided on the land for three years. There is no pretense that any one of the entrymen offered any such proof. Hence it is clearly a case where it was for the Court to rule as a matter of law whether or not the representations were material. If they were not material, it ceased to be important whether they were true or false. It is equally clear that the representations were not material, for had they been true they would have afforded no excuse, justification or reason whatsoever for issuing the patents. They could not therefore operate as an inducement to issue the patents.

It is true that statements will be found in the books and cases to the effect that where a party has effected his purpose through a misrepresentation which was false, he will not be heard to deny its materiality. That is simply an invocation of the doctrine of estoppel, which has no place in the case under consideration.

Regarding this contention on the part of the plaintiff, the Court below, 232 Fed., p. 224, said:

"The Government seeks to meet this objection to the right of recovery by invoking the doctrine that a party who has effected his purpose through a misrepresentation cannot deny its materiality. Bigelow on Fraud, 497, citing also *Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. D. 219, 59 N.W. 1066, 37 L. R. A. 593, and note. But the law cannot make that material which is absolutely not material, and so appears by the very transaction itself and the law governing the case. The law of estoppel cannot go so far as to make false representations made in one transaction binding in another and a totally distinct transaction."

The whole theory of the action for deceit is that by a false representation the plaintiff was induced to act as he otherwise would not have acted, because the false representation was of such a character that, if true, it furnished a reason or motive for his action. If the representation, being true, would

furnish no reason or justification for the action, then the plaintiff had no right to act on it or give any credence to it.

Suppose an entryman should represent to the Government officials that his ancestors had come over in the Mayflower and therefore he was entitled under the law to have a patent issued to him for 160 acres of government land, and the officer, assuming such to be the law, should issue the patent. Will it be contended that on proof of the falsity of the representation the Government would be entitled to recover damages for deceit? Would the Court be bound to submit to the jury the question of the materiality of the representation? Certainly not. The Court would say at once that the representation afforded no reason for the action taken by the Government, even if true, and hence it was wholly immaterial. As stated by Mr. Bigelow, "when the language is plain and not subject to modification *alioquin*" it is for the Court to determine whether or not the representation was material.

Now it is conceded that the entrymen in question were required to actually reside on their land four years. It is conceded that they made proof of from one to one and one-half years' residence only. It is alleged that in point of fact their proofs were false and that they did not reside on the land one or one and one-half years. That is immaterial, because the proof offered was immaterial. The Government was no more justified in issuing the patents on proof of

one or one and one-half years' residence than it would have been justified in issuing the patents on proof of residence for one day. The officials were acting under positive law. It prescribed the terms and conditions on which they could alienate the lands in question. They were not permitted to dispose of such lands on any terms other than those prescribed by the statute. It follows that any representation of a situation or state of facts short of that which the law required before patent should issue could properly constitute no inducement to the officials to issue the patents.

In *First National Bank of Elkhart v. Osborne*, 48 N.E. 256, deceit was predicated on false representation that a school warrant was "O.K." The law limited such warrants to the payment of expenses for school purposes, while the warrant in question showed on its face that it was issued for the purpose of a circulating library for the schools. The Court, in passing on the question as to whether or not the representation was material, said:

"We are unable to see in the facts before us sufficient grounds for holding him liable in an action for deceit. The appellant purchased the warrant as evidence of indebtedness of the school township, and not of Osborne. The warrant, upon its face, expressly and plainly indicated to the appellant and all others that it was void, and that the school township could not be

held liable for the price or value of the property for which the warrant was given. The representation of Osborne, in his answer to the cashier's letter of inquiry, that the warrants were 'all O.K.,' related to them, not as his individual contracts, but as evidences of indebtedness of the school township; but his statement that as such evidences they were 'all O.K.,' or all correct, or all right, *was a representation upon which the appellant had no right to rely*, it being bound to take notice of the contents of the warrants. It was stated in the special finding that the 'order was invalid when issued, which was then known by this defendant.' The Court did not state upon what fact or facts it based the statement that the order was invalid, but the facts stated in the finding showed the invalidity of the orders; and the trustee's knowledge of their invalidity, with his representation that they were 'all O.K.,' would not render him liable for deceit to a purchaser who bought them with the knowledge of their invalidity shown upon their face."

So in the case at bar, the representations, even though false, were "representations upon which the plaintiff had no right to rely." It was bound to know the law and was bound to know that even though the representations were true the entrymen were not entitled to patents. Such being the facts,

it was for the Court to say that the representations are not actionable.

The case of *Fernaux v. Sydney Webb, et al.*, 33 Tex. App. 560, was one where the false representation consisted in inducing the plaintiff to surrender possession of certain leased lands. Defendants had leased a large ranch from one Morgan and had in turn sub-leased the ranch to the plaintiff. The lease to the plaintiff contained the provision, "subject to sale of the land." That manifestly and clearly meant, subject to sale of the land by the then owner thereof to some person other than the defendants. However, it was charged that the defendants had falsely represented to their lessee, the plaintiff, that they, the defendants, had purchased the land from Morgan, and thereby the plaintiff was induced to surrender possession of the ranch to the defendants. He averred that as a matter of fact the defendants had not purchased the lands from Morgan and that the representations were false. The Court held that it was immaterial whether the representations were false or not, because even if they had been true that fact would not have entitled the defendants to possession of the land, for the clear intent and meaning of the provision in the lease, "subject to sale of the land," was in case the land should be so sold as to place it beyond the control of the defendants. The Court said:

"The meaning of the contract was that ap-

pellants should hold under the sub-lease for the full period unless the owners should make such a sale of the lands as to put them beyond the control of Sydney Webb & Co. * * * and for this reason; that is, that a sale to Sydney Webb & Co. could not operate as a termination of the sub-lease to appellants, we think they, the appellants, mistook their legal rights when they voluntarily surrendered their lease and the lands and had no recourse upon the appellees. In other words, *the representations of appellees, to be actionable, must have been material, and such as had they been true, the appellants would have been justified in acting upon.*"

Now in this case, as in the one last above cited, the Court said as a matter of law that the representations were not material because, even if true, they would not afford any reason or justification for the plaintiff taking the action he did take. So we say here, even though the representations made by the entrymen of residence and cultivation had been absolutely true, it would not have justified or afforded any excuse for the Government to execute and deliver to them patents. Therefore the representations made were immaterial and it is not important whether they were true or false.

Russell et al. v. Branhan et al., 8 Blackford (Ind.) 304, was assumpsit for \$1,000.00 on sale of a construction contract for a certain section of a

canal. The defendants requested the Court to instruct the jury "that if the plaintiffs had falsely represented to the defendants, for the purpose of inducing them to make the contract, that they had done work on said section of the canal to the amount of \$800.00 or \$1,000.00, while the canal was under the charge of the state, for which they had not received payment, and that, on the final completion of the canal, they (the defendants) would get the pay for such work done, and had thereby induced the defendants to purchase said section, when in truth there was nothing due the plaintiffs for work done on said section and they had been paid in full for all work they had done on said section, they had a right to deduct such amount from the sum to be paid to the plaintiffs." The lower Court refused to give the instruction, and the Supreme Court, reviewing that action, said:

"The second charge asked to be given by the jury was correctly refused. Had it been material to the defendants that the fact as to plaintiffs' claim for work alleged to have been misrepresented was true, the case might be different. But it was of no consequence to defendants whether such fact was true or false. Suppose the state had owed the plaintiffs for work done on the said section of the canal, the defendants could not, under the contract sold to them, have required the canal company to pay the debt. This is shown by the charter of the company.

If, therefore, the plaintiffs informed the defendants that they would have a claim on the company for such a debt, it was only a misrepresentation of the legal effect of the contract sold, for which misrepresentation the plaintiffs were not responsible. It could not have deceived the defendants, as they must be presumed to have known the law.”

Prince v. Overholser, 75 Wis. 646, was an action for fraudulent representations on sale of a land warrant. The defendant represented to the plaintiff that the warrant was good to locate on “homestead or mineral lands.” The warrant on its face read, “The holder is entitled to locate 120 acres at any land office of the United States in one body and in conformity to the legal subdivisions of the public lands, subject to sale for either the minimum or low-graduated price.” The Court said:

“Here both parties had the same information and the means of knowledge of the use that could be made of the warrant, and there was no concealment of the statement on the face of the paper which showed on what lands it could be located. If the defendant did not know or understand it, it was his own fault and negligence.”

The Court referred in the decision last above mentioned to the case of *Slaughter's Adm. v. Gerson*, 13 Wall. 385. It is there said:

“The doctrine substantially as we have stated it is laid down in numerous adjudications. Where the means of information are at hand and equally open to both parties, and no concealment is made or attempted, the language of the cases is, that the misrepresentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself in all such cases of the means of information, either attributable to his indolence or credulity, takes from him all just claim for relief.”

In both of these cases the Court held as a matter of law that the representations were not material. We submit this must always be the case where there is no dispute respecting the relations of the parties, the character of the transaction, and what was said or alleged to have been represented. Referring to the last two cases cited, and the doctrine thereof, and applying the same to the case at bar, we are at a loss to understand how it can be reasonably contended that it was not the duty of the Court here to say as a matter of law that the representations under consideration were immaterial. The duty of the Government, and of its representatives, was defined by statute. The representations alleged did not bring the entrymen within the statute, and hence afforded no ground upon which to predicate deceit, because had the alleged representations been

true, the entrymen did not make the showing necessary to the issuance of patents.

Platt v. Scott, 6 Blackford 389 (Ind.), was a case where the plaintiff sued to recover on two promissory notes executed by the defendant to the plaintiff. The defense was that the notes were obtained by fraud. It appeared from the evidence that the notes were given in part consideration of a land warrant issued under an Act of Congress entitled, "An Act creating bounties of land and extra pay to certain Canadian volunteers." There was evidence tending to show that the plaintiff represented to the defendant before the purchase, and as an inducement to it, that the warrant could be located on any land belonging to the United States within the Indiana territory, etc. The representation was in conformity with the Act of Congress of 1816 under which the warrant was issued, but the law had been changed by subsequent Act of Congress, which confined the location of warrants like that in question to lands of the United States within the State of Indiana. The Court said:

"It is considered that every person is acquainted with the law, both civil and criminal; and no one can, therefore, complain of the misrepresentations of another respecting it. In the case before us the defendant must be presumed to have known the laws relating to the location of the warrant in question; and he cannot,

therefore, be permitted to say that he was misled by the representations which the plaintiff made as to what the law was on the subject."

It seems to us that this applies with full force to the case at bar. The representations here complained of can only be construed as representing or saying to the officers of the Government that the party had resided on land one year, or one and one-half years, and had performed certain military service, and hence he was entitled to a patent. The statute required three years' actual residence, and the officers of the Government are presumed to have known the law and to have known that one or one and one-half years' residence, together with the military service, did not entitle the entrymen, or any one of them, to a patent. Hence the representations were wholly immaterial, because, if true, they furnished no ground for the action which the Government took. It will not be contended that the officers of the Government were not presumed to know the law. How can the Court harmonize that presumption with the contention that they were deceived by certain representations respecting the period of settlement, which, if true, would not bring the entrymen within the law?

An important case, and one throwing much light on the question under discussion, is that of *Robins v. Hope*, 57 Cal. 496. At page 495 the Court said:

“The misrepresentation complained of was as to the title of the plaintiffs to the premises which they were induced to convey under the impression that they had no title thereto. And we understand the rule to be, as stated by the learned Judge who sustained a demurrer to this complaint, that ‘a person is conclusively presumed to know the state of his own title to real property. This is always the case where the party deals with a stranger, as in the present case.’ No misrepresentation made by Hope or his agents, therefore, as to the proceedings in probate concerning plaintiff’s title, or as to the state of their title in any respect, could have had the effect of misleading them.”

It is well sometimes to go back to first principles, and we therefore call the attention of the Court to the observations of Chancellor Kent in his *Commentaries*, Vol. 2, pp. 484-5, 4th Ed.:

“The common law affords to everyone reasonable protection against fraud in dealings; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention

to those particulars which may be supposed within the reach of his observation and judgment, and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting in attention to those points where those would have been sufficient to protect him from surprise or imposition, the maxim *careat emptor* ought to apply."

In *Silver v. Frazier*, 85 Mass. 382, there was a count for falsely representing to plaintiff's agent the boundary of land for the purpose of inducing such agent to build a house at a point other than that at which plaintiff had directed such agent to build. It appeared that the principal had staked out the ground on which the building was to be erected and instructed his agent to erect a building in conformity to the lines by the principal so located. The principal then left the country. The defendant told the agent thereafter that the lines located by the principal were wrong and that the boundary lines was different from that indicated by the principal, and thereupon the agent abandoned the lines located by his principal and acted upon the representation made by the defendant. The Court said:

"The other objection to the maintenance of the action is that the alleged loss or injury suffered by the plaintiff is not the direct and imme-

mediate result of the defendant's wrongful act. Stripped of its technical language, the declaration charges only that the agent employed by the plaintiff to do a certain piece of work disobeyed the orders of his principal and was induced to do so by the false statements of the defendant. In other words, the plaintiff alleges that the agent violated his duty and thereby did him an injury, and seeks to recover damages therefor by an action against a third person, on the ground that he induced the agent by false statements to go contrary to the orders of his principal. Such an action is, we believe, without precedent. The immediate cause of the injury and loss to the plaintiff is the breach of duty of his agent. This is the proximate cause of damage. The motives or inducements which operated to cause the agent to do an unauthorized act are too remote to furnish a good ground of action to the plaintiff. The difficulty is not that there is want of privity between the parties. No such element is essential to enable the party injured to recover damages occasioned by a tort. It is sufficient in support of an action for deceit to show that the false statement was made with a knowledge that it was to be acted upon by the party injured, and that the act produced the damages, although the representation was made to an intermediate person. In such case the damage is the direct and imme-

diante result of the fraud, but in the case at bar the damage which the plaintiff has sustained is only the remote and consequential result of the alleged false statement of the defendant."

Why does not that recite precisely the situation here? At the utmost, all that can be contended is that the agents of the plaintiff, the Government officials, disobeyed their instructions. The statute instructed them what to do, and under what circumstances to alienate the land. It is contended, however, that, induced by certain alleged false representations on the part of the defendant, which were entirely contrary to the instructions contained in the statute, and did not bring the entrymen within the statute at all, plaintiff's agents were induced to issue the patents. The proximate cause of the plaintiff's loss was the carelessness, indolence or negligence of the agents of the Government, or their misconstruction and misunderstanding of the law. They either assumed, without inquiring, that the land was not within the Siletz Indian Reservation, or they misconstrued the law touching the requirements precedent to the issuance of a patent for lands within that reservation. In any case, the proximate cause of the plaintiff's loss was the disobedience by the Government officials of the plaintiff's instructions, namely, the provisions of the statute.

In Missouri-Lincoln Trust Co. v. Third National

Bank of St. Louis, 133 S.W. 357, a railroad company drew its check on a bank in favor of one Parker. On the same day the check, purporting to have been endorsed by Parker, was presented to defendant by a third person, and it issued to the order of Parker a draft on Chicago and delivered the draft to such third person, who forged the name of Parker and obtained the proceeds of the draft. The draft went through several hands and finally was taken up by the drawee, who discovered the forged endorsement and called upon its immediate endorser to collect from the preceding endorser and pay it. The immediate endorser did so and paid the money over to the drawee. The preceding endorser then brought suit to recover from the drawee on the ground that it had been concealed from it that the drawee had paid and taken up the draft. The Court said:

“Deceit, to be actionable, must be as to some material matter. The claimed deceit in this case is that defendant concealed from the plaintiff the fact, when it exacted repayment of the amount of the Chicago draft from it, that it had already paid the draft and had it in its possession. We are unable to see how this could possibly be concealment of a matter that at all affected the plaintiff. The presumption is that when the forgery was discovered, the draft then being in the hands of the defendant, turned in by the Chicago bank, defendant paid its amount back to the Chicago bank. Defendant was then

entitled to resort to the next responsible party, and that was plaintiff. *Even if the defendant had told the plaintiff that it had itself taken up the Chicago draft, and had paid it and had it in its possession, these facts would have been no defense to plaintiff as against repayment to either the Chicago bank or to respondent. It was liable by reason of the fact that it was the one who had obtained payment of the Chicago draft on a forged endorsement. It had money to which it was not entitled. The fact that if it had known the defendant bank had done what it was bound to do—that is, paid back to the Chicago bank the money with which it had been credited on account of this draft—could not in any way discharge the plaintiff from its obligation to make good, which it incurred when it endorsed the draft.”*

Another case to which we call the attention of the Court is *Hall v. Johnson*, decided by the Supreme Court of Michigan and reported in 2d N.W. at page 55. At page 57 the Court, speaking of the character of false representations necessary to be actionable, said:

“False representations, no matter how acted upon, will not be sufficient to set aside an agreement otherwise valid unless they were material. Immaterial representations, either true or false, cannot be made the basis of relief, even though coupled with the assertion that they were relied

upon. They may constitute a moral wrong but not a legal one."

II.

COUNSEL FOR PLAINTIFF URGE, AND AT GREAT LENGTH ARGUE, THESE TWO PROPOSITIONS: (a) A REPRESENTATION IS MATERIAL WHEN, BUT FOR IT, THE CONTRACT WOULD NOT HAVE BEEN MADE, AND (b) ONE WHO EFFECTS HIS PURPOSE THROUGH FRAUDULENT REPRESENTATION CANNOT DENY ITS MATERIALITY.

Such expressions are numerous in the books, but of course do not justify or support the conclusions counsel draw therefrom nor the application made of them. If the application sought to be made by counsel were admitted, every misrepresentation would be material if acted on by the party to whom it was made. It would be immaterial whether it was of a character, if true, to justify the action. It would only be necessary to inquire whether the fraudulent representer effected a purpose he would not have effected but for the misrepresentation. Of course that is not the law. If the misrepresentation manifestly, if true, supplied no reason for the doing of the act sought to be induced, then it is not actionable, even though had it not been made the action sought would not have been taken. In this case, for instance, the statute required three years' *actual*

residence. The entrymen claimed only one or one and one-half years. Hence, if true, the representation suggested no reason for issuing the patents. Thus, in the case of *Bank of Elkhart v. Osborne*, *supra*, the Court said that the misrepresentation as to the use to which the warrant could be devoted "was a representation upon which appellant had no right to rely, it being bound to take notice of the contents of the warrant." And in *Fernaux v. Webb*, *supra*, the Court said "the representations of appellees, to be actionable, must have been material, *and such as, had they been true, the appellants would have been justified in acting upon.*"

Counsel, we submit, entirely overlook the fact that when the entrymen offered their final proof it was material for them to prove that they had resided on the land three years. Proof of a shorter residence was wholly immaterial, as it could not entitle them to patents. The question was not, "Is it true that you have resided on the land one year?" It was not material for any purpose whether that was or was not true. The sole question was, "Have you actually resided on the land three years?" and they did not pretend that they had.

It appears to us that counsel are misled by isolated expressions stating a part only of the rule or rules by which the case is to be determined. The primary requirement, for instance, is that a false representation, to be actionable, must be material, that is, must be such as, if true, would justify the

party to whom it is made in acting upon it. If it were wholly irrelevant, and afforded no reason or inducement for the act, then it would be manifestly immaterial. It is only in cases where the misrepresentation clearly was or might have been accepted as sufficient inducement that the Court or jury are at liberty to find that but for it the contract would not have been made or other thing in question done. Also it is only in such cases that the doctrine invoked by plaintiff to the effect that one who accomplishes his purpose through a fraudulent representation, cannot deny its materiality, applies. If the representation were such that it might be an inducement to the other party and it did so operate, it is not for the perpetrator of the fraud to say that the representation was immaterial. This doctrine, however, necessarily applies only to cases where the representation might have operated as an inducement and where the party to whom it was made was at liberty to act on such inducement if he believed the representation to be true. It can have no application to a case such as the one on trial. Here the duty of the official was defined by positive law, and thereunder they were not at liberty to patent the land in the absence of proof of three years' residence. Hence, proof of a shorter residence could not induce issuance of the patent, consequently on its face was not material.

III.

WHEN THE UNITED STATES BECOMES A PARTY TO A SUIT OR ACTION IN THE COURTS, IT IS BOUND BY THE SAME PRINCIPLES THAT GOVERN INDIVIDUALS.

It is urged by counsel for the plaintiff that the United States, being the party plaintiff, should not be bound by the same rules which govern individuals. Such ought not to be, and happily is not, the law. When property rights are in issue between the Government and a private citizen, there is no reason why the Government should not be subject to the same principles of law and justice by which the citizen must be governed.

In *Vol. 29, Am. & Eng. Enc. of Law*, (2d Ed.), page 172, it is said:

“When it (United States) submits itself to the jurisdiction of a court, it is not entitled to remedies of an exceptional character, and must prove its case by satisfactory evidence in the same manner as any other suitor.”

In *United States v. Beebee*, 17 Fed. 40, it is said:

“It is well settled that when the United States becomes a party to a suit in the courts and voluntarily submits its rights to judicial determination, it is bound by the same principles that govern individuals. When the United

States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law and places itself upon an equality with other litigants."

And in the case of *The Siren*, 7 Wall. 159, the Court said:

"The Government by its appearance in Court waives its exceptions and submits to the application of the principles by which justice is administered between private suitors."

IV.

THE WELLS CASE.

The Wells case differs somewhat from the other entries. He submitted a commutation, being authorized to commute by two statutes. After the passage of the free homestead law, Act of May 17, 1900, which repealed that portion of the Act of 1894 which required payment of \$1.50 per acre for the lands in question, a second Act was passed, being that of January 26, 1901, extending the right of commutation to these lands upon a payment of the original price of \$1.50 per acre. The commutation section of the Revised Statutes, section 2301, was extended to this entry. Said section reads as follows:

"Section 2301. Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of Section 2289 from paying the minimum price

for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry upon making proof of settlement and residence and cultivation for such period of fourteen months."

This merely shortened the time within which proof could be made on paying for the lands. It did not define or change the quality of residence required. The entry was made under the Siletz law and not under the general law, therefore we must look to the Siletz law and not to the provisions of chapter 5 of title 32 of the Revised Statutes to determine the grade and character of residence required. The Siletz law requires *actual* residence. The general law permitted constructive residence. What is meant by actual residence? The Standard Dictionary defined "actual" as follows:

"ACTUAL: 1. real. indeed. or act; carried out or realized in practice; existing in fact as opposed to merely possible, constructive, conceivable or ideal.

"2. *Law.* existing in fact; real, as distinguished from conjectural or imputed by construction. As actual possession; actual notice; actual damages."

The Secretary of the Interior, in defining the words actual residence as used in this statute, in a decision rejecting a three-year proof in the case of *Adams v. Coates*, 38 Land Decisions, 179, said:

“It is noticed that, while the residence required by the Act above quoted is reduced to three years, its character is particularly prescribed—it must be ‘actual.’ This term is new to Federal legislation concerning proceedings to acquire title to public lands and it must be presumed that Congress used the term advisedly. The language of the statute being plain and unequivocal, leaving no room for construction, an apt and sensible meaning must be given thereto, it being inadmissible to either import anything into it or eliminate anything therefrom in order to change or modify its plain intent.”

Thereupon the Secretary held that Coates had been *on the land actually* for only 26 months, out of the 36 months required, and that the showing was insufficient to entitle him to a patent.

Now Wells, who was required to *actually* reside on the land for 14 months, testified in his final proof that he was only on the land five times, or visited it five times “from one to two weeks” each time. Hence he did not claim more than from five to ten weeks, out of fifty-six weeks required, of actual residence, and, as the Court below held, the showing made did not entitle him to a patent, therefore the representations were not material.

V.

THE MINIMUM GOVERNMENT PRICE, HOWEVER, IS THE UTMOST THAT THE GOVERNMENT CAN RECOVER IN THE WAY OF DAMAGES.

The fourth affirmative defense is that the lands in question were patented erroneously and that prior to the institution of this action they had been conveyed to certain named good-faith purchasers.

Respecting this defense, our contention is that in no event can the Government recover more than the minimum price of the patented lands. This contention is predicated on the *Act of March 2, 1896*, found at page 450, volume 6, Fed. Stat. Ann. Section 3 of said Act is as follows:

“That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a *bona fide* purchaser or are *bona fide* purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or cer-

tification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a *bona fide* purchaser as aforesaid, or that such persons or corporations are such *bona fide* purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified."

The provision in the foregoing section respecting "the value of the land as hereinbefore specified," refers to the provision contained in the preceding section, which is that the value to be recovered "in no case shall be more than the minimum government price" of the land.

The first section of the Act refers to suits to vacate and annul patents to lands erroneously issued under a railroad or wagon road grant. Section 3, however, very clearly applies to all cases where land has been "erroneously patented," as is evident from the language, which provides for suit being brought "against the patentee, or corporation, company, person or association of persons for whose benefit the patent was issued."

The Circuit Court of Appeals for the Eighth

Circuit, in the case of *United States v. Norris*, 222 Fed. 14, had this statute under consideration. At page 22 the Court said:

“Whether or not this section applies to a patent for a homestead entry commuted to a cash entry, may admit of some doubt. The Act of which it is a part is entitled, ‘An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents and for other purposes.’ This is broad enough to include all patents erroneously or fraudulently issued under any Acts of Congress.”

The Court then refers to the fact that section 1 of said Act provides that “suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought * * * within six years after the date of the issuance of such patents, and the limitation of section 8, chapter 561, Second Session of the Fifty-first Congress, and amendments thereto, are extended accordingly as to the patents herein referred to.” Proceeding, the Court then says:

“The reference to section 8, c. 561, is to the Act of March 3, 1891 (26 Stat. 1099) (Comp. St. 1913, Sec. 5114). Sections 2 and 3 of the Act of March 2, 1896, above referred to, are within the title of this Act, and are broad enough to include

a *bona fide* purchaser of lands erroneously or fraudulently patented under any of the Acts of Congress, and would therefore include a fraudulent entry under the homestead law. The Act indicates the purpose of Congress that as to lands erroneously or fraudulently patented, for which nothing has been received by the Government, it shall only recover the minimum Government price thereof from the patentee upon the title being confirmed in a good faith purchaser from him."

In *United States v. Pitan*, 224 Fed. 604, the District Court for South Dakota also had this statute under consideration, and at page 610 the Court said:

"This Act indicates the purpose of Congress that as to lands erroneously or fraudulently patented, for which nothing has been received by the Government, it shall only recover the minimum Government price thereof from the patentee, upon the title being confirmed in a good faith purchaser from him, and is broad enough to include all patents erroneously or fraudulently issued under any of the Acts of Congress."

We submit that the statute clearly contemplates that where lands have been patented through fraud or mistake, the limit of the Government's recovery is the minimum price. It was insisted in the Court below that the statute does not apply to cases of fraud. As stated, however, in the two decisions

from which we have last above quoted, the statute is broad enough to include cases of fraud. It is not necessary, however, for the purposes of this case, to determine that question, for very clearly the patents here were issued erroneously, and that without regard to whether or not the representations alleged were false. Indeed, it is conceded by counsel for the Government that either the Government officials erred in their construction of the statute providing for the sale of the Siletz lands, or overlooked the fact that these lands were within that reservation. It would seem that the latter was the error committed, for it will not be disputed that prior to the issuing of the patents in question the Department of the Interior had held that military service could not be accepted in lieu of residence under the statute providing for the sale of these lands. Unquestionably, therefore, the Government officials overlooked the fact that these lands were within that reservation, and hence erroneously patented them. But if that be not the case, then they construed the statute as permitting credit to be given for military service, which concededly was erroneous. In either view the lands were erroneously patented, and if the Government is entitled to recover at all, it can only recover the minimum price.

VI.

THE STATUTE OF LIMITATIONS.

Section 8 of the Act of March 3, 1891, reads as follows:

“That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.”

The Court below held against the plea of the statute of limitations, but as the case was determined in our favor, we assume the judgment will not be reversed if for any reason appearing in the record it should be affirmed. We therefore present the question.

It is averred in the complaint that the patents issued in the year 1902. This action was instituted in June, 1912. It is not averred, nor is it contended that the Government did not discover the alleged fraud within the six years next preceding the commencement of the action. It follows that the right of the Government to institute a suit to avoid or annul the patents, is barred, and the question is, does that fact destroy not only that remedy, but as well the right of the Government to recover in any form of action for the alleged fraud.

It is frequently said that statutes of limitations operate only to extinguish the remedy; that they do not affect the right, and hence we find it held that where one has two remedies, arising out of a particular transaction, and one is barred by the statute, he is not precluded from pursuing the other. But, as we shall see, this rule is not of universal application. Thus, in the *American & English Enc. of Law*. (2d Ed.), page 146, it is said:

“It has often been declared by text writers and judicial authority to be an elementary principle that a statute of limitations affects the remedy only, and not the merits. But this is true only in so far as the statute affords an exemption from liability in personal actions. In such cases it operates on the remedy merely, leaving the right unaffected in other respects. But in so far as the statute operates as a positive prescription, as a means whereby title is vested and new rights are created, it not only bars the remedy but destroys the original right as well. In the former class of cases the right remains and may be enforced by some other remedy than the one barred by statute if such other remedy exists, as in the case of mortgages, or it may form the consideration for a new agreement, while in the latter case the right, being destroyed, cannot again exist except through such formality and for such con-

sideration as are required for its creation originally.”

Now the right of the Government to institute a suit to annul or vacate the patents in this case existed because of the alleged fraudulent practices of the defendant, if it ever existed. It had that right, if the allegations of the complaint be true, for the term of six years from the date of the issuance of the patents, or if it did not discover the fraud until later, then for the term of six years from the date of the discovery of the fraud. At the expiration of the six years, in either case, the title of the grantees of the Government became absolute. Even if the patents were void in the beginning, at the expiration of the prescribed period, no suit being instituted, all defects in the title were cured and the patents became as completely valid as if no defect had ever existed. That such is the true construction of the statute is made manifest by the decisions of the Supreme Court of the United States. Thus, in *United States v. Wynona & St. Peter Railroad Company*, 165 U. S. 463, the Court, speaking through Mr. Justice Brewer, said:

“In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregulari-

ties on the part of the officers of the Land Department *should be open for consideration*. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, *be conclusive against the Government*, and this notwithstanding any errors, irregularities, or improper action of its officers therein.

“Thus, in the Act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the Land Department was, *what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title*, providing only that the land was public of the United States and open to sale and conveyance through the Land Department. The Act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that Act. It is true that these

appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the Government, *the grantor therein, should not be heard to question them.*"

This was the first case in which that Court was called upon to construe the Act of March 3, 1891.

In the subsequent case of *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447, the Court, speaking of this statute, said:

"The statute just referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act,'—that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States, and in kind open to sale and conveyance through the Land Department. (Citing authorities.) The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it *or to validate it* when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of

the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the Act were confined to valid patents it would be almost or quite without use. (Citing authorities.) In form the statute only bars suits to annul the patent. But the statute of limitations, with regard to land, at least, which cannot escape from the jurisdiction, *generally are held to affect the right, even if in terms only directed against the remedy.* (Citing authorities.) This statute must be taken to mean that the patent is to be held good, *and is to have the same effect against the United States that it would have had if it had been valid in the first place."*

The latter case is important in this, that it affirms the doctrine which we have quoted above from the *American & English Enc. of Law*, for it will be noted the Court says:

"In form the statute only bars suits to annul the patent, but the statute of limitation, with regard to land, at least, which cannot escape from the jurisdiction, *generally are held to affect the right.* Even if in terms only directed against the remedy, this statute must be taken

to mean that the patent is to be held good, and has therefore the same effect against the United States that it would have had if it had been valid in the first place.”

Here is a clear statement to the effect that not the remedy alone is affected, but the rights which the Government had growing out of the transaction are destroyed.

Manifestly the Supreme Court of the United States gives the same effect to this statute that it gives, and is generally given by the Courts, to title by prescription. This is clear, because in support of the statement last quoted the Court cites the case of *Sharon v. Tucker*, 144 U. S. 533. In that case the Court said :

“It is now well settled that by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner should he intrude upon the premises. In several of the states this doctrine has become a positive rule by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall of itself constitute a complete title.”

The Court also refers to the case of *Davis v.*

Mills, 194 U. S. 451, 48 L. Ed. 1067. With reference to that decision is unquestionably the following statement which I quote from the latter edition, at page 1071, where it is said :

“Prescription which applies to easement the analogy of the statute of limitations unquestionably vests a title. There is no such thing as a merely possessory easement. A disseisor of a dominant estate may get an easement which already is attached to it, but the easement is attached to the land by title or not at all. Again, as to land, the distinction amounts to nothing, because to deny all remedy direct or indirect, within the state, is practically to deny the right. The lapse of time limited by such statutes not only bars the remedy but it extinguishes the right and vests a perfect title in the adverse holder.”

In *Louisiana v. Garfield*, 211 U. S. 70, the Supreme Court of the United States again made reference to the Act of 1891, and in stating the effect of the construction put upon that statute by that Court in its previous decisions, said :

“In *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447, it was decided that this Act applied to patents, even if void because of a previous reservation of the land, and it was said that ‘the statute not merely took away the remedy but validated the patent.’ That is to

say, it not only took away the remedy but it destroyed the right of the Government, and when the right of the Government is destroyed it is the same as if she never had a right, or, in the language of the decision last quoted, it was said: 'That the statute not merely took away the remedy but it validated the patent.' "

If the patent is validated, then it stands exactly as if it had been perfectly valid at the beginning or when issued. Indeed, the language of the Supreme Court in *United States v. Chandler*, above quoted, is:

"This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place,"

and we have seen that the Court previously said that statutes such as the one under consideration "generally are held to *affect the right* even if in terms only directed against the remedy."

How is it possible to escape the conclusion that the patent, being by this statute validated from the beginning and the right of the Government growing out of the circumstances in which the patent was issued destroyed, the Government is precluded from pursuing any remedy to recover on such right? Suppose, for instance, that instead of enacting the statute of limitations as it did the Government had

passed an Act subsequent to the issuance of the patents in question reciting that notwithstanding the fact that the Government contended that the patents had been issued through fraud and perjury, the patents were validated and should be held and deemed to have been valid at the time they were issued, could it be reasonably contended that thereafter the Government could prosecute an action to recover damages because of the false representations made and the perjury committed to induce the Government to issue the patents? And yet the Supreme Court of the United States has said, as we have shown, in more than one case in construing this statute, that its effect is to "destroy the right" and validate the patent so that it "is to have the same effect against the United States that it would have had if it had been valid in the first instance," and has also said that "the statute not merely took away the remedy, but validated the patent."

So, in *United States v. Exploration Co.*, 190 Fed. 405, Judge Lewis, after a review of the decisions of the Supreme Court above mentioned, said:

"There was no active fraud involved in any of these cases, though Mr. Justice Brewer considered the statute in question in that aspect. Each of these cases holds that the statute is to be applied not only *against the remedy*, but that it *affects the rights of the parties*, that on the expiration of the time limited the patent be-

comes conclusive as a transfer of the title, notwithstanding it may have been voidable; indeed, though it may have been void, nevertheless the statute must be taken to mean that the patent becomes validated on the expiration of six years after its date and passes the title to the patentee as effectively as though it had been valid in the first instance. Thus the statute is made an inflexible rule of property; as much so as statutes which pass title through open, notorious, adverse and continuous possession maintained for a fixed period."

The rule here announced is well stated and forcibly argued in the Kentucky case of *Dorsey v. Phillips*, 1 S.W. 667, where the Court, at page 669, says:

"The statute of limitations of this state bars not only the legal remedy, but the legal right; also, whenever the legal remedy is destroyed, the legal right is also destroyed. 'The very idea of a legal right is that it is one which may be enforced by law. The legal right and the legal remedy are therefore correlative. The former implies the existence of the latter, and the latter implies the existence of the former,—neither can exist without the other.' It is also well settled that the statute of limitations of this state that bars the right to recover the possession of property, or to subject it to the payment of a debt, also perfects the title in the person of

the claimant. (Citing authorities.) * * *
That the conveyance was either actually or constructively fraudulent, as against appellants, there can be no doubt.

“In either case, however, the statute of limitations provides that no action shall be brought to set aside the conveyance, and subject the property to appellant’s debt, on account of such fraud, after the lapse of ten years from the time of such conveyance. If this statute means anything, it means that the non-action of ten years on the part of the appellants *validated and perfected* the appellees’ right to said land under said conveyance, as against them, and all others similarly concerned in setting the conveyance aside, and who failed to take action within the ten years; nor does this statute require any adverse holding of the property conveyed, in order to perfect the right of the vendee as against the persons whose rights are affected by the conveyance. It is sufficient if the holding is consistent with the right conveyed, as in this case. The fact that the persons whose rights are affected by the conveyance delay to bring their action within the time fixed by the vendee’s title as against them.”

At page 1020 of 25 Cyc. it is said:

“Statutes Extinguishing Right of Action—
a. In General. When the statute of limitations

of a particular state or country not only bars the right of action but extinguishes the claim or title itself *ipso facto* and declares it a nullity after the lapse of the prescribed period, and the parties have been resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case, it must be held to be an extinguishment of the debt or claim, wherever an attempt may be made to enforce it."

Hence statutes which not only bar the remedy but extinguish the right preclude a recovery in any form of action. It would be entirely illogical to hold that a statute may at once destroy the remedy to recover the land and the right of the Government growing out thereof and yet hold that the Government may prosecute an action to recover damages because of the wrongful taking of the land. To hold that by virtue of the statute the patent is to be deemed and held to be valid from the date of its issue, and yet hold that the Government may show, in an action to recover damages instituted after the statute has run, that the patent was secured through fraud, would be entirely contradictory. It is inconceivable that the right of the Government can be destroyed and the patent declared valid from its date, and yet that the Government may be permitted to prove that the patent was secured through fraud. If the right of the Government is destroyed and the

patents are to be construed and held to have been valid when issued, it follows that the patent carries with it all presumptions which the law attaches to such instruments. It is conclusive not only as to the qualification of the person to whom issued and his title, but it is conclusive upon the question of the performance of the conditions required by the Act of Congress under which the patent was issued. It cannot be held that the patent was valid when issued and that the Government is bound to treat it as valid when issued if it shall also be held that the Government may nevertheless show that it was procured through fraud and perjury. The very declaration that the patent is to be deemed valid from the date of its issuance carries with it the conclusive presumption that every act and thing necessary to secure the patent was done in a lawful manner. Yet if this complaint shall be sustained, it is entirely obvious that in order to enable the Government to prevail it will be necessary for it to attack the validity of the patents in question and to establish the fact that they were fraudulently procured, and that in the very teeth of the presumption which now attaches to them as to the regularity of all proceedings had for their procurement, and in the face of the statute which has operated to make them legal and valid from the beginning. It is, indeed, an attempt on the part of the Government to do indirectly and in this collateral way what it could not do in a direct proceeding.

In the case above cited, *United States v. Chandler-Dunbar Water Power Co.*, the Circuit Court of Appeals, 152 Fed. 25, denied the right of the Government to thus collaterally and indirectly attack a patent which it could not attack directly, the Court saying:

“Counsel for complainant raises two objections to the application of this statute. One is that this suit is not a suit to annul the Chandler patent, but only to maintain the title to these islands, and that they attack the validity of the patent only for the purpose of maintaining the title to the islands. This amounts to a contention that *although the patent could not be attacked directly, after the time prescribed, yet it may be done indirectly, for the purpose of controlling an incident, the right to which flows from the patent itself.* The proposition is too plainly untenable for argument. But we add that the general rule is that possession of land under a claim of title for the period prescribed by a statute of limitation vests the title in him for whose protection the statute creates the limitation; and if, as we think, possession is not necessary under this statute, the lapse of time is of itself sufficient to effect the same result. The right of action of the United States, assuming it to have had any, was complete at the date of the passage of the act, and the lapse of five

years without action to annul the grant resulted in the confirmation of it."

The patent of the United States when valid stands on an entirely different footing from the deed of an individual. It is an instrument of a higher order and ranks with judgments founded on unimpeachable evidence. Thus, in *Steel v. Smelting Co.*, 106 U. S. 447, an attempt was made in an action at law to attack the validity of a patent of the United States to land on the ground of bribery, perjury and subornation of perjury, but the Court, at page 453, said:

"The validity of a patent of the Government cannot be assailed collaterally because false and perjured testimony may have been used to secure it, any more than a judgment of a court of justice can be assailed collaterally on like ground. If a judgment has been obtained by such means the remedy of the aggrieved party is to apply for a new trial or take an appeal to a higher court. * * * He may also institute some direct proceeding to reach the judgment. Until set aside or enjoined it must, of course, stand against a collateral attack with the efficacy attending judgments founded upon unimpeachable evidence. So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the Government to

which the alienation of the public lands is confined, the remedy of the aggrieved party must be sought by him in a court of equity, if he possesses such an equitable right to the premises as would give him the title if the patent were out of the way."

If these patents have been validated by operation of the statute in question, as they have been as that statute has been construed again and again by the Supreme Court, then it follows that they stand as unimpeachable as a judgment "founded upon unimpeachable evidence." In no collateral proceeding can any person be heard to say that the evidence upon which the department acted in issuing the patents was false or procured through fraud. To hold that such testimony may be admitted and yet at the same time to hold that the patents are absolutely valid and were valid at the time they were issued is so utterly illogical that we cannot believe that such a rule will be adopted by any court.

In *Northern Pacific Railway Company v. Eli*, 197 U. S. 1, L. Ed. 49, the Supreme Court of the United States again evidenced its adherence to the rule that statutes of limitations as they apply to real property, operate not only to bar the remedy but to extinguish the right. At page 641, L. Ed., the Court, in that case, said:

"The rule in the State of Washington as to

adverse possession is thus stated by the Supreme Court in this case:

“One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations; and this is true, even though he may have originally entered under void grant or sale. But his claim ripens into a perfect title and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washburn on Real Property, 5th Ed., page 176:

“The operation of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly because it seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title.’” 25 Wash. 388, 54 L. R. A. 530, 87 Am. St. Rep. 768, 65 Pac. 556.

“In *Sharon v. Tucker*, 144 U. S. 533, 543, 36 L. Ed. 532, 535, 12 Sup. Ct. Rep. 720, 722, where the statute of limitations in force in the District of Columbia was applied, Mr. Justice Field, speaking for the Court, said:

“It is now well settled that, by adverse

possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner, should he intrude upon the premises. In several of the states this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall, of itself, constitute a complete title. *Leffingwell v. Warren*, 2 Black. 599, 17 L. Ed. 261; *Campbell v. Holt*, 115 U. S. 620, 623, 29 L. Ed. 483, 485, 6 Sup Ct. Rep. 209.'

"This was quoted in *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 538, 48 L. Ed. 291, 292, 24 Sup. Ct. Rep. 166, 167, and it was remarked:

"'Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance.'"

**IF THE PATENTS HAVE BEEN VALIDATED,
AND THE TITLE TO THE LAND VESTED
UNCONDITIONALLY IN THE PATENTEES,
HOW CAN THE GOVERNMENT RECOVER
THE VALUE OF THE LANDS?**

The foregoing decisions clearly support the proposition that the effect of the limitation statute is not simply to bar the right of the Government to recover

the land, but to vest the title to the land in the patentees, and, as stated in *Louisiana v. Garfield*, *supra*, "it destroyed the right of the Government, and when the right of the Government is destroyed it is the same as if she never had a right"; and again, "the statute not merely took away the remedy but it validated the patent."

If the Government's rights in the premises are destroyed as effectually "as if she never had a right" in the matter, how can she now recover the value of the land? Is it not a startling incongruity to say the patent is validated, the rights of the Government, whatever they were, are destroyed, and the title to the land is vested indefeasibly in the patentees, yet the Government can recover the value of the land because the patent was secured through fraud? How can the Government recover the value of the land if it has no interest in it and all its rights relating to it are destroyed by statute?

The Government will doubtless largely rely on the case of *Southern P. R. Co. v. United States*, 200 U. S. 342, 50 L. Ed. 507. That was a case where the Government by mistake conveyed to the S. P. Co. certain lands on the assumption that they had been granted to it by an Act of Congress, when in fact the lands were no part of the grant. The railway company sold the lands thus patented to it by mistake to *bona fide* purchasers, and the Government sought to recover from it the value of the land, not exceeding the minimum Government price, as pro-

vided in the Act of March 2, 1896, ch. 39, 29 Stat. L. 42 (6 Fed. Stat. Ann. 449). It was contended by the Government that the statute constituted a contract between the company and the Government. Mr. Justice Brewer, referring to that contention, said:

“Passing to the other question, it is charged in the bill that these statutes constituted a valid contract between the Government and the railroad company. Now whether that be strictly true we need not stop to consider. It is enough that upon the facts the Government was entitled to recover from the company. Erroneously and by mistake the officers of the Government executed patents to the railroad company conveying the legal title to the lands. The railroad company accepted such title and subsequently conveyed the lands to parties who dealt with it in good faith. When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyances and re-establish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser. The conveyance to the innocent purchaser is equivalent to a conversion of personal property. Irrespective,

therefore, of the Act of Congress, the Government had the right, when it found that these lands had been erroneously patented to the railroad company, and by it sold to persons who dealt with it in good faith, to sue the railroad company, and recover the value of the lands so wrongfully received and subsequently conveyed."

There can be no doubt of the soundness of that statement as applied to the case there being considered. By mistake, land to which the company had no right whatever, had been conveyed to it, and by it sold to persons who took in good faith and without notice of the defect in the company's title. The company had no right to the land, yet it retained it, sold it and received the money for it, and of course the Government could follow and recover the fund. An action to recover the proceeds of the sale was instituted by the Government within six years from the date of the patent. *At that time neither the remedy nor the right of the Government had been by the limitation statute affected.* But for the fact that the patentee had alienated the land and it was then held by an innocent purchaser, the Government could have had the patent annulled. The situation or period when, by virtue of the statute, a void patent becomes valid and the Government's remedy barred and its rights extinguished had not yet come about. All rights of the Government were yet fully alive.

There is, however, a further distinction between the case last cited and the one at bar. In the former case the grantee had no pretense of right to the land; it was patented to it by mistake and of course the Government was entitled to recover back either the land or its value. In the case of lands granted under the homestead laws, we shall attempt to show under another title that there is no basis on which the Government can recover its value, in any circumstances.

THE LIMITATION STATUTES SHOW THAT
THE PURPOSE OF THEIR ENACTMENT
WAS TO DESTROY ALL CLAIMS OF THE
GOVERNMENT IN CASES SUCH AS THIS,
AFTER THE EXPIRATION OF SIX YEARS.

This, we think, is quite apparent. In the first place, we believe that statutes regarding remedies of the Government against a citizen should be viewed in a different light from statutes regulating or prescribing remedies as between private parties. The Government creates and prescribes her own remedies. Such as she cares to exercise she prescribes, and the individual has no voice in the matter. Hence, when the Government has by public enactment specified the remedy it will invoke for a certain wrong, it is fair to presume that she has adopted that remedy to the exclusion of all others. But when she provides that in a specified case she will avail herself of an additional remedy, it would

seem to establish a conclusive presumption that in all other cases the one remedy only will be pursued.

When we come to investigate the matter of remedies the Government has adopted in cases of this character, we find that since the enactment of the homestead law there never has been, so far as the reported decisions disclose, a single case of this character prior to instituting this suit, but numerous cases have been prosecuted to avoid or annul patents on the ground that they were secured through fraud. Such being the remedy uniformly followed, in 1891 the statute we have quoted was enacted limiting the period within which such suits may be brought. Clearly, this statute was designed, on the expiration of such time, to preclude the Government from asserting any remedy. This is the more manifest when we remember the effect which has always been given such statutes, namely, that they not only bar the remedy but destroy the right. But in 1896 additional legislation was enacted, whereby it was provided that when lands have been erroneously patented to "a railroad or wagon road," a suit to annul the patent might be brought within six years unless the land so patented should have been conveyed to a *bona fide* purchaser, in which case his title was confirmed and suit was directed to be brought against the patentee for the value of the land, not exceeding the minimum price. True, it was stated by the Supreme Court, as we have seen, that such would have been the right of the

Government without the statute, but nevertheless we think the legislation clearly indicates that it was not the intention of Congress that any remedy should be pursued after the expiration of the statute. Apparently it was deemed that the right of the Government for a period of six years to proceed to recover the land or the minimum price thereof was quite sufficient. We submit that a fair construction of this statute is, that either the suit to annul or to recover the minimum price must be commenced within the six-year limitation.

VII.

THERE IS NO METHOD BY WHICH THE DAMAGES SUSTAINED BY THE GOVERNMENT CAN BE MEASURED.

A most persuasive reason why the limitation statute should receive the construction contended for above, is that it is not possible to compute the damages sustained by the government, and hence it has but one remedy, and that is to avoid the patent and recover the land. It will probably be argued that the market value of the lands is the measure of damages, but manifestly that is not true.

In 20 Cyc. 130, the measure of damages in cases of fraud is thus stated:

“The general rule of damages in cases of fraud is that the party defrauded is entitled to recover the amount of the loss caused by the

fraud of the other party, or, as it has been expressed, plaintiff is entitled to recover damages adequate to the injury which he has sustained. Plaintiff can recover the entire amount of his loss occasioned by the fraud, but the recovery must be limited to the *actual loss* sustained by reason of the fraud."

In *Smith v. Boles*, 132 U. S. 125, the Supreme Court of the United States affirmed this rule.

In *Dinwiddie v. Stone*, 52 S.W. 814, the Supreme Court of Kentucky held that the measure of damages for inducing the purchase of a lot by falsely representing it to be above the established grade of the street is the amount necessary to make it conform to the street grade.

In *Johnson v. Culver*, 19 N.E. 129, the Supreme Court of Indiana held that in an action to recover damages for fraud in inducing one to transfer a large amount of personal property at much less than its value, the measure of recovery is the difference between the amount received and the actual value. The same rule was adopted by the Supreme Court of Michigan in *McMillan v. Reaume*, 100 N.W. 166. Beyond doubt, such is the rule adopted by a very great majority of the courts. Can such rule be observed or followed here? It seems to us not. The principle is compensation for the actual loss. The Government was not selling its land; was not seek-

ing to get the market value thereof by the transaction.

In this case each entryman paid the land office fees; erected a house on his entry, and, if he did not in good faith make it his residence, he credited his term of service as a soldier or sailor on the required period of residence, and although there was no authority of law for so doing, he doubtless thereby forever barred himself from again exercising that right and relieved the Government of its liability to provide him a homestead out of the public domain. In other words, each surrendered to the Government as cancelled and satisfied, his right to that credit. It is apparent that the Government did receive no small consideration for the land. Now it can recover not the value of the land, but the value of what it was to receive but did not receive. This is not a suit to rescind. On the contrary, the Government has elected not to rescind. If there had been no settlement; no payment of fees; no compliance with the terms of the entry, it would be difficult to see how the Government could recover on the basis of the value of the land, because it was not seeking to receive that by the transaction, and hence that value was not its loss. But it is not a case where there was no compliance with or performance of the conditions of the gift. As we have seen, not only were the fees paid, but some improvements were made and at least the term of service of each entryman in the army or navy was credited on the re-

quired term of residence and that right surrendered and cancelled. The Government cannot now say that it will give no credit for these acts of part performance. If it assumes the position of a private litigant and invokes the rules applicable to controversies between private citizens, it must expect to conform to all the essential requirements that would be imposed on an individual. It cannot affirm the grant, sue for the value of the land and refuse to give any credit for the admitted part performance.

Suppose A. should admit an indebtedness to B. for three years' services, and hence say to him, "If you will surrender your claim against me for such services, pay the taxes, reside on and cultivate that certain tract of land for one year, I will deed the land to you," and suppose B. should fraudulently induce A. to believe he had resided on and cultivated the land for the required period and thereby induced A. to convey to him the land, could A. affirm the grant and recover the value of the land? Would he not have to give credit for such performance as had been made? Would he not have to give credit for the value of the three years' services. Certainly he would. So, if it shall be held here that the Government can maintain this action, it follows that credit must be given for the value of the improvements made and the rights surrendered, for the Government has affirmed the grant and seeks to recover the difference between what it received and what it was to receive. It received performance to the extent of

certain admitted improvements, cultivation, payment of fees, and surrender of claims for the period of army and navy services. It will be asserted, and we concede, that it is impracticable to compute the value of such part performance. That simply argues, indeed, as we contend, proves, that such an action as this cannot in any case be sustained. The transaction was not on a money or value basis. It was more in the nature of a gift, and yet it was not purely a gift. Consideration was exacted, and a part thereof, at least, paid. This is not a case where the Government can insist on the forfeiture by the defendant or the patentees of such payment as was made. Had it desired that, it should have rescinded the grant by avoiding the patents. It elected to affirm the grant and sue for damages; hence, it must give credit for the value of the part performance of the conditions. Of course that is impracticable. There is no rule by which the damages can be measured. Hence, this remedy cannot be pursued. It may be contended that no credit can be given for part performance; that the Government is entitled to absolute or at least substantial compliance with all the conditions. That only goes to fortify our position, namely, that the Government has but one remedy, rescission. We say again, no money consideration or thought of money values entered into the transaction on the Government's part. Whether a claim was worth \$100.00 or \$100,000.00 was immaterial. The same conditions were imposed and the

same consideration exacted in either case. The value of the land was not considered or sought. The object was, not to reap benefit or advantage for the Government, but to advantage and benefit the patentee. It was at once a plan to distribute the public lands to the people and to improve the condition of the homeless by making it possible for them to secure a home. It was thought this could be best accomplished by requiring residence on the lands for a specified period as a condition precedent to the grant. The Government was willing to and it was its policy to give the lands to such citizens as would reside on and cultivate them for the stated period. This policy did not contemplate any pecuniary profit or advantage to the Government. The transaction was in no sense a sale—hence there was no possibility of pecuniary loss to the Government, consequently there can be no pecuniary recovery for failure to conform to the conditions. The Government might, if it so elected, annul the patent, if it discovered that the patentee had not performed the conditions, or it might let it stand and ripen into a perfect grant vesting an indefeasible title. The latter is what it has seen fit to do, and having so done the matter is closed. There can be no recovery of damages for no damages were suffered, no pecuniary benefit having been sought by the transaction, on the part of the Government. It might have revoked the gift, but it saw fit to confirm it.

We respectfully submit that the decision of the Court below should be affirmed.

FULTON & BOWERMAN,
Attorneys for Defendant in Error.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

WILLARD N. JONES,

Defendant in Error.

REPLY BRIEF of PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United
States for the District of Oregon.

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States for the District of Oregon.

STATEMENT.

In the brief of defendant in error counsel raises two questions which were not assigned as error by the plaintiff in error, nor presented in its brief, to-wit:

1. That the action is barred by the statute of limitations;
2. That the minimum government price is the utmost that can be recovered.

As to the latter question this court has stated that it would not pass upon same, but would consider the former question, and it therefore becomes necessary to reply to the argument of counsel for the defendant with respect thereto.

The complaint avers that the patents were issued to all the entrymen involved in this case between the dates of September 26, 1902, and October 12, 1903. This action for damages for the alleged fraud and deceit was instituted June 11, 1912. A demurrer to this complaint was filed by the defendant on the ground that the cause of action was barred by the statute of limitations, and in support of this demurrer counsel for the defendant submitted section 8 of the Act of March 3, 1891, which reads as follows:

“Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.”

The lower court overruled this demurrer and in an opinion reported in *United States vs. Jones*, 218 Fed, 973, held that this act does not apply to actions by the United States to recover damages for alleged fraud com-

mitted in procuring the government's title to public lands through fraudulent entry and proof under the homestead act. Thereupon, the defendant filed his answer and for a second further and separate defense again set up the statute of limitations as a bar to this action, demurrer to which the court sustained, holding that this had already been adversely decided against defendant.

ARGUMENT.

While it may be true that the patents were issued more than six years prior to the commencement of this action, it will be noted that this is not a suit in equity to rescind the patents as particularly covered by this statute of limitations, but is an action at law for the recovery of damages which necessarily implies a ratification of the patents. Furthermore, it must be conceded, we believe, that it is the settled law that the government is not bound by any statute of limitations unless Congress has clearly manifested its intention that it shall be so bound. (*United States vs. Inslay*, 130 U. S. 263). The statute of limitations cited by defendant in support of his contention, therefore, does not apply to this action for damages for it is not so manifested therein, but, on the contrary, clearly pertains to suits in equity for rescission.

This particular question has been decided adversely to defendant's contention in three very recently reported cases, all of which are directly in point, to-wit:

United States vs. Pitan, reported in 224 Fed.
604,

United States vs. Koleno, reported in 226 Fed.
180,

Bistline vs. United States, reported in 229 Fed.
546.

United States vs. Pitan, 224 Fed. 604:

This was an action for damages for fraud committed by the defendant in procuring patents to public land through fraudulent proofs. Demurrer to this complaint was filed on the ground that the action was barred by the statute of limitations. The demurrer was overruled, the court holding that the act of March 3, 1891, does not apply to action for damages for fraud, but merely to suits in equity to rescind the patent. And the court in that decision considered the same points raised by Willard N. Jones in his brief, to-wit: that this statute barred the right as well as the remedy; and the case of United States vs. Chandler-Dunbar Company, 209 U. S. 447, was likewise submitted by de-

fendant in support of his contention. The opinion of the court, in part, reads as follows:

It will be observed that the patent law then

~~It is further contended in behalf of defendant~~ land was issued more than six years prior to the commencement of this action, and this action is not an action in equity for the cancellation of the patent, but an action at law for the recovery of damages sustained by the plaintiff for the reasons set forth in the complaint, the substance of which is as above stated. * * *

“It is further contended in behalf of defendant Pitan that, the statute of limitations adopted March 3, 1891 (26 Stat. 1099, c. 561), having run against annulment of the patent, the statute bars, not only the remedy, but the right, and therefore this action will not lie for recovery on account of the fraud perpetrated in acquiring title to the lands. That the general government is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it shall be so bound, is so well settled that it needs no citation of authority. U. S. vs. Inslay, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968; U. S. vs. Jones (D. C.), 218 Fed. 973.

The statute relied upon by the defendant, in so far as it is material here, is as follows:

‘An act to repeal timber culture laws and for other purposes,’ approved March 3, 1891 (26 Stat. 1095, 1099, c. 561).

‘Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this

act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.' Section 8.

Does this statute bar, not only the remedy, but the right, and therefore will no other right of action lie for recovery on account of the fraud perpetrated in acquiring title to the lands in question: In view of the rule above stated, that the government is not bound by any statute of limitations unless Congress has clearly manifested its intention that it shall be so bound, can it be said that, by a fair interpretation of this provision of the law of 1891, Congress intended that the United States should from that time be limited, under circumstances such as are alleged in the complaint herein, to an action in equity to cancel the patent?

Clearly the United States, in common with the individual citizen, at the time of the enactment of this statute, might have more than one right of action growing out of the fraudulent acts of the defendants set forth in the complaint, and in my judgment it had the right to avail itself of its different remedies, the same as an individual. One of those remedies was the right to bring an action for damages sustained by the plaintiff by reason of the false and fraudulent representations made by the defendants, whereby the plaintiff was induced to and did part with the title to the land in question.

It is urged, however, that this remedy does not survive the expiration of the statutory period of six years named in this statute; it being conceded that while, in form, this statute only bars suits to annul the patent, by analogy to statutes of limitation gen-

erally, with regard to land, it should now be held to affect the title, and that with the loss of the right to retake the title, which has been divested through the defendant's wrong, it follows necessarily that with the loss of that right the plaintiff loses the right to bring the action to recover damages for the same wrong.

I have carefully considered the language of the court in *United States vs. Chandler-Dunbar Co.*, 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, and find some justification for the defendant's position; but considering the fact that the relief in that case was for the cancellation of the patent, and that the language there used had reference only to the question of plaintiff's right to that relief, I am satisfied it was not the intention of the court to hold that it was the intention of Congress when this statute of limitation was enacted, to extend the limitation further than its express language indicates. I am satisfied, also, that by the enactment of this statute there was no intention on the part of Congress to disturb the general governmental policy with reference to the bringing of actions generally by the United States to assert any public interest, or to enforce any public right, and that the rule with reference to such actions, including the right to bring this action for damages, is in no wise affected by the statute in question.

I am of the opinion that the sole purpose of this statute of limitation was to give stability to titles depending on patent from the government; its effect being to confirm such title after six years in the patentee, or his assignee, and to waive any right of action it may have had for annulment of the patent, but in no manner intended to bar the gov-

ernment of its right of action to recover damages for fraud such as is alleged in the complaint herein. It follows, therefore, that this court is of the opinion that the government of the United States has a right of action to recover damages against the defendants Henry and Pitan, sustained by it by reason of the alleged fraud of such defendants."

It will thus be seen that this case, clearly in point, answers all the arguments raised by defendant in his brief. The government had been conceded at all times to have the right to an election of two remedies where patents had been secured through fraud, to-wit: the right to sue in equity to rescind the patent, or else to ratify the patent and sue for damages. It has chosen the latter remedy which clearly is not affected by the statute of limitations, the sole purpose of such statute merely being to confirm patents after six years, and thus give stability to titles depending upon patents from the government.

United States vs. Kolenko, 226 Fed. 180:

This was an action at law to recover damages for fraud in securing patents under the homestead law. Demurrer was interposed on the ground that the action was barred by the statute of limitations, which demurrer was sustained by the lower court, but reversed by the circuit court of appeals for the eighth circuit.

The facts in that case are also identical with the case at issue. The court held there that the act of March 3, 1891, was strictly a statute of limitations and did not create the right to maintain an action to set aside the patent; that patents procured from the United States by fraud are not void, but voidable, and the government may elect to rescind the patent or to ratify it and sue for damages.

Bistline vs. United States, 229 Fed. 546:

This was an action at law for damages for fraud in securing patents. This case is squarely in point with that in issue, the action having been brought for the recovery of damages arising by the fraudulent procurement of defendant's title to 160 acres of public land, patent having issued therefor more than six years prior to the commencement of the action. In that case counsel for Bistline invoked the same argument as that advanced by counsel for the defendant Jones and relied largely upon the same authorities, particularly with reference to the decision of the supreme court in the case of *United States vs. Chandler-Dunbar Company*, 209 U. S. 447.

In the Bistline case demurrer was also filed to the action on the ground that it was barred by the statute

of limitations, and the lower court, in overruling same, held that this statute was one designed by Congress to give certainty and stability to land titles only, and could not be invoked in bar to an action for the recovery of damages accruing through the fraudulent procurement of patent. Upon writ of error to the circuit court of this circuit, the judgment of the lower court was affirmed, and bearing upon the question of the statute of limitations the opinion of this court was as follows:

“It was alleged in the complaint that the patent in suit was issued to the defendant by the United States on June 30, 1906. The present action was commenced by the filing of the complaint on September 17, 1913—more than seven years thereafter. In support of its contention that the demurrer should have been sustained, the defendant invokes section 8 of the act of Congress of March 3, 1891 (26 Stat. 1093). That section provides as follows:

‘Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.’

It is sufficient to say that the section has no application to the present case. This is an action at law to recover specific damages for the fraudulent acquisition of land by the defendant from the government and for the subsequent fraudulent sale thereof by him to third parties. It is not a suit

to vacate or annul a patent. No attempt is being made by the government to recover the lands. They are left in the hands of the present owners. The act may not by construction be extended beyond the boundary fixed by its plain terms.

‘The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt.’ United States vs. Beebe, 127 U. S. 338, 344, S Sup. Ct. 1083, 1086, 32 L. Ed. 121; United States vs. Inslay, 130 U. S. 263, 266, 9 Sup. Ct. 485, 32 L. Ed. 968.”

In the face of these decisions bearing squarely upon the point raised by defendant and in cases almost identical with the one at issue there seems to be no question as to the right of the government to maintain this action for damages and likewise that it is not barred by any statute of limitations.

for the sake of the argument
It may be conceded that a suit in equity by the government for the recovery of the lands is ~~undoubtedly~~ barred by the act of March 3, 1891, which limits the bringing of such suits to a period of six years after the date of the issuance of the patents. The question then arises, does this statute limit the United States to an equitable action for the recovery of the particular lands

or can the United States maintain an action for damages resulting through fraud and deceit practiced in obtaining title independent of any statute authorizing such action. It is apparent from a careful reading of the statute of limitations mentioned, that the statute in terms purports to apply only to suits to vacate or to annul patents. There is no reference therein to actions for damages or for the value of the land as upon an implied contract to pay what the land is worth, and it is contended by the government that while the United States, through the enactment of this statute and failure to bring suit for the recovery of these lands within the six-year period of limitation has consented not only to have its equitable remedy barred, but to have its right to recover the land extinguished and the title confirmed in the grantees, its consent to waive all remedy for the fraud practiced upon it is not necessarily implied. This is the effect of the decision in the case of *United States vs. Bistline* (*supra*).

It must therefore be conceded that the government is not remitted to a suit in equity. It has been held that a patent for land which has been obtained by fraud may be overthrown either in court of law or in equity. (9 Ency. Pl. & Pr. 678.)

In *United States vs. Winona, etc. R. R.*, 165 U. S. 463, the intimation is that an action at law will lie in a case like this. The government is entitled to all the remedy which the courts can give (*United States vs. Minor*, 114 U. S. 241), and as the relief sought is not equitable in its nature, a court of law is competent to adjudicate the issue of fraud. The action is of a legal nature. The remedy at law is plain, adequate and complete.

It is urged by the defendant that the running of the six-year limitation against suits in equity for the recovery of the lands patented to the entrymen operates to bar a suit for damages by reason of the fact that title to the lands is now unassailable either by the government or in a collateral proceeding. It is not contended by the government that the title to these particular lands can be assailed, and this action is not brought to that end. If such a right of action as that here brought exists at all, it exists independently of the right to sue in equity for the recovery of the lands in question and is based upon a wholly different theory of the law. The suit here brought against Jones is not in any sense a collateral attack upon the patents issued by the United States to the entrymen used by Jones in obtaining patents to these lands and does not attempt to assail the

title thereto. This title has vested long since in the parties and their grantees and is secure from such attack. It is submitted, therefore, that the numerous cases cited by counsel for defendant in his brief and going to the question of collateral attack upon the patent issued by the United States, and granting portions of the public domain, are outside the issue. In all cases cited by counsel for the defendant and going to the question of collateral attack, the attack has been attempted by some one a stranger to the title, or the portions quoted from opinions are, as applying to the case at bar, mere dicta.

IN CONCLUSION.

The opinion of Judge Wolverton, reported in *United States vs. Jones*, 218 Fed. 973, overruling the defendant's demurrer on the ground that this action is barred so clearly and conclusively disposes of defendant's contentions in this respect that we take the liberty to quote fully therefrom as follows:

"It is contended that the statute bars, not only the remedy, but the right, and therefore no other right of action will lie for recovery on account of the fraud perpetrated in acquiring title to the lands. The effect of the statute is tersely stated by Mr. Justice Holmes, in *United States vs. Chandler-Dunbar Co.*, 209 U. S. 447, 450, 28 Sup. Ct. 579, 580 (52 L. Ed. 881), as follows:

'In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell vs. Warren*, 2 Black, 599, 605 (17 L. Ed. 261); *Shareon vs. Tucker*, 144 U. S. 533 (12 Sup. Ct. 720, 36 L. Ed. 532); *Davis vs. Mills*, 194 U. S. 451, 457 (24 Sup. Ct. 692, 48 L. Ed. 1067). This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States vs. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476 (17 Sup. Ct. 368, 41 L. Ed. 789).'

And in a later case—*Louisiana vs. Garfield*, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. Ed. 92—it is said:

'In *United States vs. Chandler-Dunbar Water Power Co.*, 209 U. S. 447 (28 Sup. Ct. 579, 52 L. Ed. 881), it was decided that this act applied to patents, even if void because of a previous reservation of the land, and it was said that the statute not merely took away the remedy, but validated the patent.'

In other words, the running of the statute has the effect to vest in the patentee a perfect title to the land. Very true, but the statute is concerning suits to vacate and annul patents, and comprises but one remedy. That remedy having lapsed, the patent is validated, and the title becomes perfect in the holder under the patent. The language does not give it broader scope or operation.

It is settled law that the general government is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it shall be so bound. *United States vs. Inslay*, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968. The United States, like an individual, may have more than one right of suit or action growing out of the same transaction, and there exists no good reason why the government may not waive or avail itself of its remedies in like manner as can an individual. The point is well illustrated by the case of *Southern Pacific Co. vs. United States*, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507, wherein it appears that the government, through mistake, patented to the railroad company quite a large body of land, which subsequently passed into the hands of innocent purchasers. The government sued to recover the value of the land, and the suit was sustained. In disposing of the case, Mr. Justice Brewer, speaking for the court, says:

‘When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyances and re-establish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser. The conveyance to the innocent purchaser is equivalent to a conversion of personal property.’

If the government may sue to recover the value of lands procured from it through mistake, why may it not sue to recover the value of lands procured

through fraud? In either case there are simply two remedies: One for the recovery of the land, where it has not passed to innocent holders; and the other for the value of the lands taken. It has its choice of remedies, and it may therefore waive one remedy and proceed upon the other. That, it seems to me, is all the government has done in the present case. Desiring to give stability to titles depending on patent from the government, it has preferred to confirm such titles after six years in the patentee, and thereby waive any right of action it may have had for annulment of the patent; but the language of the limitations act is not susceptible of broader construction and indicates no intendment to bar the government of its right of action to recover the value of land obtained through fraud.

I hold, therefore, that the present action is not barred by the statute."

It is, therefore, respectfully submitted that the contention of defendant that this action is barred by the statute of limitations is without merit.

CLARENCE L. REAMES,

United States Attorney.

BARNETT H. GOLDSTEIN,

Assistant United States Attorney.

9

United States
Circuit Court of Appeals
For the Ninth Circuit.

M. A. ELLIS,

Appellant,

VS.

J. L. REED,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Territory of Alaska, Third Division.

Filed

JUL 21 1916

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

M. A. ELLIS,

Appellant,

vs.

J. L. REED,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Territory of Alaska, Third Division.

INDEX TO THE PRINTED TRANSCRIPT OF
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court for the Territory of Alaska,
Third Division.*

Names and Addresses of Attorneys of Record.

Mr. S. O. MORFORD, Seward, Alaska,

Mr. J. J. FINNEGAN, Seward, Alaska,

Attorneys for Defendants and Plaintiff in
Error.

Mr. J. L. REED, Valdez, Alaska,

Messrs. LYONS & RITCHIE, Valdez, Alaska,

Attorneys for Plaintiff and Defendant in
in Error. [4*]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Amended Complaint.

Comes now the plaintiff and for cause of action
against the defendants files this his amended com-
plaint and alleges:

I.

That on August 7th, 1912, William C. Snook
filed an action in the District Court of Alaska, Third

*Page-number appearing at foot of page of original certified Record.

Division, against the defendant Eri Thompson and one Dave Wallace to recover upon a claim of indebtedness; a writ of attachment was issued on the same day out of the clerk's office of said court and thereafter, to wit, on September 22d, 1912, duly levied by the United States marshal upon said Battle Axe Claim as the property of said Eri Thompson; certificate of said levy was duly filed in the office of the commissioner and recorder in which said claim is situated on the 25th day of July, 1914.

II.

Pursuant to said attachment a judgment was duly entered in the District Court of Alaska, Third Division, in favor of said William C. Snook, for the sale of the interest of said Eri Thompson in said attached property to liquidate the indebtedness found due from him to the said William C. Snook, to wit, the sum of \$582.68. A copy of said judgment is annexed hereto, marked exhibit "A" and made a part hereof. Said judgment was subsequently assigned to the plaintiff herein, and plaintiff is now the legal owner thereof and said judgment is wholly unsatisfied.

III.

On August 14, 1912, Karl Karlson filed an action in the District Court of Alaska, Third Division, against the defendant Eri Thompson and one Dave Wallace to recover upon a claim of indebtedness; a writ of attachment was issued on the same day out of the clerk's [5] office of said court, and thereafter, to wit, on September 22d, 1912, duly levied by the United States marshal upon said Bat-

the Axe Claim as the property of said Eri Thompson; certificate of said levy was duly filed in the office of Cook Inlet Precinct, in which said claim is situated on the 25th day of July, 1914.

IV.

On July 13th, 1914, assignment of said Karl Karlson's right of action in said cause to J. L. Reed, plaintiff herein, was filed in said action on July 14th, 1914, pursuant to said attachment a judgment was duly entered in the District Court of Alaska, Third Division, in favor of said J. L. Reed, for the sale of the interest of said Eri Thompson in said attached property to liquidate the indebtedness found due from him to plaintiff, to wit, the sum of \$822/30. A copy of said judgment is annexed hereto, marked exhibit "B" and made a part hereof and said judgment is wholly unsatisfied.

V.

That the defendant Eri Thompson was on the 25th day of October, 1909, the owner of the Battle Axe Claim on Thunder Creek, in the Cook Inlet Recording Precinct, Territory of Alaska, and ever since said date has been and now is such owner.

VI.

That on or about the 22d day of May, 1910, a certain paper, dated the 29th day of October, 1909, purporting to be a deed of conveyance and which was in form a deed of conveyance, purporting to convey from the defendant Eri Thompson to the defendant J. M. Cummings certain real chattel property, the same being then and now the property of the defendant Eri Thompson, was filed for record

in the office of the recorder of Cook Inlet Precinct, at Susitna, Alaska, and was thereafter duly recorded in the records of said office. The property purported to be sold and conveyed by said purported deed was described therein as follows, to wit:

“That certain placer mining claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook [6] Inlet Mining and Recording Precinct.

An undivided one-half interest in and to that certain saloon situated in the town of Susitna, Alaska, known as Thompson and Price saloon; together with and including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon was situated.

That certain log house adjacent to John Jones' bath-house, and lying between said bath-house and the general merchandise store of H. W. Nagley, in said Susitna; together with all fixtures and chattels therein contained, owned by said first part and also that certain log cabin situated in the rear of said log house, with all chattels therein contained.”

VII.

That said purported deed was not made in good faith nor for any valid consideration, but was a device for, and was made and received with, the intention of placing the property of said Thompson beyond the reach of creditors, and particularly this plaintiff, and for the purpose of hindering, delaying and defrauding this plaintiff in the collection of his said claims and judgments, and that

said purported sale and conveyance were made and accepted in consummation of a combination and conspiracy between said Thompson and Cummings to defraud plaintiff and other creditors and that the said defendant Ellis long prior to the 28th day of February, 1913, had knowledge and knew of said fraudulent intent and conspiracy and of the fraud rendering void said deed as to plaintiff's claims and judgments and of the existence of said claims and judgments and of the fraudulent intent of his immediate grantor Cummings and of each and all the facts rendering void the title of his said grantor Cummings as to plaintiff's rights and judgments herein.

VIII.

Plaintiff alleges that Dave Wallace departed from the Territory of Alaska on or about the month of October, 1907, and that he has not returned to the said Territory since said date. That he departed from the Territory of Alaska for the purpose of defrauding and defeating plaintiff in the collection of his claims and judgments. That Dave Wallace has no property, real or personal in the Territory of Alaska or elsewhere known to plaintiff out of which plaintiff could satisfy his judgments herein and that the said Dave Wallace is insolvent. [7]

IX.

That the said deed between Thompson and Cummings heretofore set forth was given and made for the purpose of hindering, delaying and defrauding plaintiff in the collection and satisfaction of plaintiff's claims and judgments herein and transferred

all of the property, real and personal, of the defendant Eri Thompson in the Territory of Alaska or elsewhere known to plaintiff, and out of which he could satisfy his judgment herein, and that the said Eri Thompson is insolvent and that neither Dave Wallace nor Eri Thompson have any other property, real or personal, individual or partnership, other than that transferred by Eri Thompson to J. M. Cummings out of which plaintiff could secure the payment and satisfaction of his judgments herein.

X.

That on the 28th day of March, 1913, the defendant M. A. Ellis, filed for record in the office of the recorder of the Cook Inlet Recording Precinct, Territory of Alaska, a deed, dated February 28th, 1913, purporting to convey from J. M. Cummings, grantor, to M. A. Ellis, grantee, the Battle Axe Group of mining claims attached in this action, for a consideration of ten thousand dollars; that said defendant Ellis went into actual possession of the said mining claims on or about the 7th day of December, 1911, under a contract entered into on said date between J. M. Cummings and M. A. Ellis for the purchase of the said claims by Ellis; that a paper purporting to be a receipt from J. M. Cummings to M. A. Ellis for \$4,000 as payment on the above contract of purchase for the sale of the above mining claims was filed for record in the office of the recorder for the Cook Inlet Recording Precinct, Territory of Alaska, on the 11th day of March, 1912, in Vol. 1 Misc., at page 41; that prior to and continuing after the posses-

sion of said Battle Axe group of mining claims by Ellis under said contract of purchase a cause of action had been commenced in this court on the 22d day of April, 1911, entitled, Thomas H. Meredith vs. Eri Thompson and J. M. Cummings, to set aside said deed between Thompson and Cummings dated [8] October 25th, 1909, and recorded on the 22d day of May, 1910, conveying said Battle Axe group of mining claims as being in fraud of the creditors of Thompson and to subject said claims to a creditors lien of judgment in favor of Meredith; said judgment having been obtained by Meredith in this court on the 25th day of April, 1910, for the sum of \$1,598.60 and costs, and thereafter on the 22d day of May, 1910, plaintiff Meredith filed for record in the office of the recorder of the Cook Inlet Recording Precinct, Territory of Alaska, a certified transcript of said judgment; that on the 12th day of January, 1912, Meredith assigned his judgment to J. L. Reed who was substituted as plaintiff in said cause and thereafter judgment was entered in favor of plaintiff in said latter cause on the 4th day of May, 1912, from which an appeal was taken, and that thereafter, to wit; on the 3d day of February, 1913, the Circuit Court of Appeals affirmed said judgment, and held said deed from Thompson to Cummings, dated October 25th, 1909, void for fraud. That on the 7th day of August, 1912, plaintiff's assignor William C. Snooks filed an action in this court entitled William C. Snooks vs. Eri Thompson and Dave Wallace S-20 for work and labor done by the said Snooks as a placer

miner on said Battle Axe group of mining claims in the year 1907; and that on the 14th day of August, 1912, plaintiff's assignor, Karl Karlson filed an action in this court entitled Karl Karlson vs. Eri Thompson and Dave Wallace S-21, for work and labor done by the said Karlson on said Battle Axe group of mining claims in the years 1906 and 1907; and that in said causes plaintiff attached and levied upon said Battle Axe group of mining claims on the 22d day of September, 1912, that on, before and after said date the defendant Ellis was and continued in actual possession of said mining claims aforesaid; that the return of said levy of attachment was filed in this court on the 3d day of December, 1912; that the said defendant Ellis had previous notice and knowledge of each and all the foregoing facts and proceedings hereinbefore set forth in this paragraph and all of which occurred prior to the 28th day of February, 1913, the date of the purported deed [9] between Cummings and Ellis and, hence, the 28th day of March, 1913, the date when said deed was filed for record, and of the existence before said dates of plaintiff's claims, judgments, attachments and levies of attachment and all of the facts affecting the validity of said purported deed and that the said Ellis had previous notice of the fraudulent intent of his immediate grantor Cummings, and that said deed was made by Cummings in furtherance of a combination and conspiracy between Thompson and Cummings to defraud the creditors of the former and particularly this plaintiff and of each and all

the facts rendering void the title of Cummings and of the fraud rendering void the deed dated October 25th 1909, between Thompson and Cummings.

XI.

The defendant M. A. Ellis claims to be the owner of said Battle Axe claim by virtue of the aforesaid deed from said J. M. Cummings to whom said Thompson made a deed thereof. That said deed from Thompson to Cummings has been held by this court and the Circuit Court of Appeals, in a proceeding to avoid it for fraud, to have been made in fraud of creditors and wholly null and void. Said Thompson has not at any time made any other deed to any person than the one to Cummings, set aside by the Court as aforesaid for fraud, and the legal title to said Battle Axe claim is still vested in the said Thompson and remains subject to execution for his indebtedness, the claim of title thereto by said defendant Ellis being based and wholly dependent upon said fraudulent and void deed to J. M. Cummings.

XII.

That plaintiff has no plain, speedy and adequate remedy at law.

WHEREFORE, plaintiff prays for a decree of this court declaring said purported deed of conveyance from the defendant Eri Thompson to the defendant J. M. Cummings to have been without any consideration and made in fraud of creditors of said Eri Thompson and of plaintiff's judgments and that the same be vacated, set aside and held for naught; and that the property therein described

be decreed to be still the property of said Eri Thompson and subject to the [10] lien of plaintiff's judgments, attachments and certificates of attachment filed and recorded as hereinabove set forth and that the said deed from Thompson to Cummings be decreed void as to plaintiff's rights and that the said deed from J. M. Cummings to M. A. Ellis dated the 28th day of February, 1913, purporting to convey said Battle Axe group of mining claims conveyed no title or interest, legal or equitable superior to plaintiff's judgments, attachments and certificates of attachment filed and recorded and that any title or interests, legal or equitable therein or thereto are junior and inferior to the rights of this plaintiff by virtue of the same. Plaintiff further prays that this court may order and decree that said Battle Axe group of mining claims be sold upon execution according to law to satisfy plaintiff's judgments herein described, that plaintiff's be allowed a reasonable attorney's fees herein and for his costs and disbursements and further relief as he may be entitled to in equity and good conscience.

LYONS & RITCHIE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

J. L. Reed, being duly sworn deposes and says, that he is the plaintiff in the above-entitled action and that he has read the foregoing amended complaint and he believes it to be true.

J. L. REED.

Subscribed and sworn to before me this 26 day of June, 1915.

[Seal]

D. F. MILLARD,
Notary Public for Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 26, 1915. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.
[11]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON and M. A. ELLIS,

Defendants.

Demurrer to Amended Complaint.

Comes now the defendant M. A. Ellis in the above-entitled cause, by his attorney, S. O. Morford, and demurs to the amended complaint on file herein, and for cause of demurrer states:

That said amended complaint does not state facts sufficient to constitute a cause of action against defendant M. A. Ellis, either in law or equity.

Wherefore, defendant M. A. Ellis prays he may hence be dismissed with his costs.

S. O. MORFORD,
Atty. for Defendant, M. A. Ellis.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 19, 1915. Ar-

thur Lang, Clerk. By Robert L. Wever, Deputy.
[12]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Minute Order Overruling Demurrer.

Now, on this day, this matter came on to be heard; J. L. Reed and E. E. Ritchie appearing as attorneys for the plaintiff and S. O. Morford appearing as attorney for the defendants and on behalf of the demurrer and after arguments had and the court being fully advised in the premises,

IT IS ORDERED that said demurrer be and the same is hereby overruled and the defendants are given ten days in which to further plead or answer, and said case is set for trial for the Seward, 1915, term to follow the conclusion of the jury cases.

February 1915 Term—October 15th—120th Court
Day Friday.

Entered Court Journal No. 9, page 358. [13]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Answer to Amended Complaint.

Comes now the defendant M. A. Ellis answering unto plaintiff's amended complaint on file herein.

I.

Answering unto paragraph I in plaintiff's amended complaint contained: This defendant has not sufficient knowledge or information to form a belief as to the truth or falsity of the matters and things therein stated, and therefore denies the same and the whole thereof.

II.

Answering unto paragraph II in plaintiff's amended complaint contained: This defendant has not sufficient knowledge or information to form a belief as to the truth or falsity of the matters therein stated, and therefore denies the same and the whole.

Further answering unto said paragraph II this defendant denies that a copy of any judgment was attached to said amended complaint as in said paragraph set forth, or at all.

III.

Answering unto paragraph III in plaintiff's amended complaint contained: This defendant has not sufficient knowledge or information to form a belief as to the truth or falsity of the matters therein stated, and therefore denies the same and the whole thereof.

IV.

Answering unto paragraph IV in plaintiff's amended complaint contained: This defendant has not sufficient knowledge or information to form a belief as to the truth or falsity of the matters [14] therein stated, and therefore denies the same and the whole thereof.

Further answering unto said paragraph IV this defendant denies that a copy of any judgment was attached to said amended complaint as in said paragraph set forth, or at all.

V.

Answering unto paragraph V in plaintiff's amended complaint contained: This defendant denies that Eri Thompson is the owner of the Battle Axe Claim on Thunder Creek, in the Cook Inlet Recording Precinct, Territory of Alaska, or that he has been the owner thereof since the 25th day of October, 1909, and this defendant avers the facts to be, that on or about the month of October, 1909, the said Eri Thompson then being the owner of the Battle Axe association mining claim on Thunder Creek in Cook Inlet Recording Precinct, Territory of Alaska, sold and conveyed said mining claim to J. M. Cummings.

That on or about the 12th day of June, 1910, said J. M. Cummings executed to Alfred Harper a lease and option to purchase said Battle Axe association mining claim.

That thereafter, about February, 1912, the said Alfred Harper for a valuable consideration assigned and transferred said lease and option to purchase to this defendant.

That on or about said date of February, 1912, this defendant paid to J. M. Cummings for and on account of said purchase the sum of Four Thousand (\$4000) Dollars.

That on or about February 28th, 1913, at the city of Seattle, State of Washington, this defendant made the final payment of the purchase price of said mining claims to said J. M. Cummings, and received a deed therefor, which deed was duly recorded in the Cook Inlet mining and recording Precinct on the 28th day of March, 1913.

That at the time of said final payment, said J. M. Cummings and his attorney, S. O. Morford, stated to this defendant that the title to said Battle Axe mining claim was absolute and perfect, save and except a certain judgment in favor of Thomas H. Meredith and [15] against Eri Thompson and J. M. Cummings in the sum of about Sixteen Hundred (\$1600) Dollars, and that there were no other claims against, or incumbrances on said property.

That at the time of said final payment there was placed in the hands of S. O. Morford, trustee, out of the moneys paid by this defendant to said J. M. Cummings the sum of Two Thousand (\$2000) Dol-

lars, which said sum was to be held by said Morford and paid to said Cummings in case said suit then on appeal in the Circuit Court of Appeals should be decided in favor of J. M. Cummings, but if said suit was decided adverse to said Cummings, then said Morford was to pay said judgment out of the moneys held by him as trustee.

That this defendant is informed and believes, and therefore alleges that said suit of Thomas H. Meredith vs. Thompson and Cummings was decided in favor of said Meredith and against said Cummings, and that afterwards said judgment was fully paid and satisfied out of the said funds held by S. O. Morford, trustee.

That this defendant had no knowledge or information that there existed any other claims or demands of any kind or nature against Eri Thompson and Dave Wallace or Eri Thompson and J. M. Cummings, other than the suit of Thomas H. Meredith vs. Thompson and Cummings.

That this defendant had no knowledge or information that there was any defect in the title of J. M. Cummings to said Battle Axe claim, or any claim of defect other than the suit of Meredith, until long after said final payment had been made by this defendant, and the deed of said property received by this defendant from said J. M. Cummings.

VII.

Answering unto paragraph VIII in plaintiff's amended complaint contained, this defendant denies the same and the whole thereof.

VIII.

Answering unto paragraph VIII in plaintiff's

amended complaint [16] contained, this defendant has not sufficient knowledge or information as to the truth or falsity of the allegations of said paragraph, and therefore denies the same and the whole thereof.

IX.

Answering unto paragraph IX in plaintiff's amended complaint contained, this defendant states that he has no knowledge or information sufficient to form a belief as to the truth or falsity of the matters therein alleged, and therefore denies the same and the whole thereof.

X.

Answering unto paragraph X in plaintiff's amended complaint contained, this defendant admits that he filed for record a deed from J. M. Cummings to M. A. Ellis, of the Battle Axe group of mining claims and denies that he went into possession of said mining claims on the 7th day of December, 1911, or at any time prior to the —— day of ——, 1912.

This defendant denies that he had any knowledge, prior to May, 1912, of any action against J. M. Cummings affecting his title to said Battle Axe group of mining claims, denies that he now has or ever had any knowledge or information that the conveyance was void or given in fraud of creditors, and at all times was assured by J. M. Cummings and his attorney S. O. Morford, that said group of mining claims was the lawful property of J. M. Cummings, and that the said Cummings had full right and authority to sell the same.

This defendant admits that prior to his final pay-

ment on said mining claim he was informed that a judgment had been entered against Thompson and Cummings for the sum of about \$1,600.00 and that said judgment was on appeal to the Circuit Court of Appeals, and if not reversed said judgment would be paid by the said J. M. Cummings.

This defendant denies that he had any knowledge or information of any suit filed by Wm. C. Snooks against Thompson and Wallace or suit of Karl Karlson vs. Thompson and Wallace, or that any [17] levy or attempted levy had been made upon said Battle Axe group of mining claims in September, 1912, or at any other time prior to July, 1914; that this defendant was absent from the Territory from about the 1st day of September, 1912, to about March, 1913:

This defendant denies that he ever knew or now knows that said transfer and conveyance of said Battle Axe group of mining claims from Thompson to Cummings was in fraud of creditors or intended as a fraud, and this defendant avers that he believed the title of said property was lawfully vested in said J. M. Cummings when he purchased the same from Cummings.

This defendant denies any knowledge or information of any claim or demand of any person or persons, other than the suit of said Meredith vs. Thompson and Cummings, either before or at the time of his final payment to said J. M. Cummings for said Battle Axe group of mining claims, on or about the 28th day of February, 1913. He denies that he had any knowledge or information of any suit or attach-

ment of Karl Karlson or William C. Snooks or any other person or persons against J. M. Cummings, or Dave Wallace, or Eri Thompson, at or prior to the 28th day of February, 1913, the date when this defendant made final payment to said J. M. Cummings and received from him a deed to said Battle Axe group of mining claims.

XI.

Answering unto paragraph XI in plaintiff's amended complaint contained, this defendant admits that he claims to be the owner of said Battle Axe group of mining claims by virtue of a deed from J. M. Cummings, and this defendant denies that said deed from said Thompson to said Cummings was held by this court or the Circuit Court of Appeals to have been made in fraud of creditors and wholly null and void, and avers that this defendant purchased said Battle Axe group of mining claims in good faith, paying full value therefor and without knowledge of any wrong or defect in his grantor's title. He denies that said deed of Thompson to Cummings has been [18] held void by this Court or the Circuit Court of Appeals, other than as against the judgment of Meredith vs. Thompson et al., and avers that said judgment has been fully paid and satisfied.

That this defendant, by reason of plaintiff's action casting a cloud upon defendant's title, has been damaged in the sum of Five Hundred Dollars (\$500).

Wherefore, defendant prays judgment against plaintiff:

1. That plaintiff take nothing by this action.

2. That this defendant have and recover from plaintiff damages in the sum of Five Hundred Dollars (\$500).

3. That he have and recover from plaintiff reasonable attorney's fees and costs of suit, and for such other and further relief as he may be entitled to in equity.

S. O. MORFORD,

Attorney for Defendant M. A. Ellis.

United States of America,

Territory of Alaska,—ss.

M. A. Ellis, being first duly sworn, deposes and says, that he is one of the defendants in the above-entitled cause, that he has read the above and foregoing answer to plaintiff's amended complaint, knows the contents thereof, and that the same is true, as he verily believes.

M. A. ELLIS.

Subscribed and sworn to before me this 5th day of October, A. D. 1915.

[Seal]

CURTIS R. MORFORD,

Notary Public in and for the Territory of Alaska,
Residing at Seward Therein.

My commission expires October 8, 1915.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 21, 1915. Arthur Lang, Clerk. By Robert L. Wever, Deputy. [19]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS, and J. M. CUM-
MINGS,

Defendants.

Reply.

Comes now the plaintiff herein and replying unto the new matter contained in the affirmative defenses set forth in defendant's answer on file herein:

1.

Plaintiff denies each and every allegation of the new matter constituting a defense herein set forth in paragraphs five, eight, ten and eleven of defendant's answer on file herein.

LYONS & RITCHIE and
J. L. REED,

Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

J. L. Reed, being first duly sworn deposes and says, that he is the plaintiff in the above-entitled action and that he has read the foregoing reply and he believes the same to be true.

J. L. REED.

Subscribed and sworn to before me this 11th day of November, 1915.

[Seal]

WM. H. WHITTLESEY,
Notary Public for Alaska.

Commission expires Nov. 30, 1916.

Service accepted this 11th day of November, 1916.

S. O. MORFORD and
J. J. FINNEGAN,
Attorneys for Defendant.

I hereby certify that the foregoing is a full, true and correct copy of the Reply on file in the above cause.

J. L. REED.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 11, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[20]

Plaintiff's Exhibit "A"—Judgment in Snook v. Thompson et al.

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-20.

WILLIAM C. SNOOK,

Plaintiff,

vs.

ERI THOMPSON and DAVE WALLACE, Co-
partners as WALLACE and THOMPSON,
Defendants.

JUDGMENT.

This cause came on to be heard before the Court this 14th day of July, 1914, upon the motion of plaintiff for judgment as prayed for in plaintiff's complaint, the defendants being in default for pleading or other appearance. Plaintiff appeared by his counsel, J. L. Reed and E. E. Ritchie, and no person appeared for defendants, or either of them. It being made to appear to the Court from the verified complaint of plaintiff that defendants are indebted to him in the sum of Five Hundred and Eighty-two & 68/100 dollars (\$582.68) for work and labor performed for them as a placer miner pursuant to contract of employment, and that real property belonging to the defendant Eri Thompson, within the jurisdiction of this court has been attached in this action to secure plaintiff's claim:

It is therefore ordered and adjudged that the property heretofore attached herein to secure plaintiff's claim, as aforesaid, be sold upon execution to satisfy the amount of plaintiff's demand, with accrued interest, costs of action and sale, or so much of said property as may be necessary to satisfy plaintiff's claim, interest and costs; and that in case of sale of less than the whole of said property the remainder be delivered to the defendant Eri Thompson, upon demand.

Done in open court at Valdez, Alaska, this 14th day of July, 1914.

FRED M. BROWN,
Judge.

**Plaintiff's Exhibit "B"—Judgment in Reed v.
Thompson et al.**

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-21.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON and DAVE WALLACE, Co-
partners as WALLACE and THOMPSON,
Defendants.

JUDGMENT.

This cause came on to be heard before the Court this 14th day of July, 1914, upon the motion of plaintiff for judgment as prayed for in plaintiff's complaint, the defendants being in default for pleading or other appearance. Plaintiff appeared in person and by his counsel, E. E. Ritchie, and no person appeared for the defendant or either of them. It being made to appear to the Court from the verified complaint of plaintiff that defendants are indebted to him in the sum of \$525 upon an assigned account for work and labor performed for defendants by plaintiff's assignor, Karl Karlson, together with interest on said sum from March 16, 1907, amounting in the aggregate to \$822.30; and that real property belonging to the defendant Eri Thompson within the jurisdiction of the Court has been attached in this action to secure plaintiff's claim:

It is therefore ordered and adjudged that the real

property heretofore attached as aforesaid in this action be sold upon execution to satisfy the amount of plaintiff's demand, with accruing interest, costs of action and sale; or so much of said property as may be necessary to satisfy plaintiff's claim, interest and costs; and that in case of sale of less than the whole of said property the remainder be delivered to the defendant Eri Thompson, on demand.

Done in open court at Valdez, Alaska, this 14th day of July, 1914.

FRED M. BROWN,
Judge.

Plaintiff's Exhibit "B." Cause S-49. [22]

**Plaintiff's Exhibit "D"—Mandate of U. S. Circuit
Court of Appeals in Thompson et al. vs. Reed.**

*United States Circuit Court of Appeals, for the
Ninth Circuit.*

No. 2162.

ERI THOMPSON and J.M. CUMMINGS,

vs.

J. L. REED.

MANDATE.

United States of America,—ss.

The President of the United States of America, to
the Honorable the Judges of the District Court
of the United States for the Territory of Alaska,
Third Division, GREETING:

(Seal of the Circuit Court.)

WHEREAS, lately in the District Court of the

United States for the Territory of Alaska, Third Division, before you, or some of you, in a cause between J. L. REED, Plaintiff, and ERI THOMPSON and J. M. CUMMINGS, Defendants, No. S. 9, a judgment was duly filed on the 4th day of May, A. D. 1912, in favor of the said plaintiff and against the said defendants; which said judgment is of record in the said cause in the office of the clerk of said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

AND WHEREAS, on the 23d day of October, in the year of our Lord one thousand nine hundred and twelve, the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly submitted to the Court for consideration and decision on briefs:
[23]

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellants.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellants for his costs herein expended, and have execution therefor.

(February 3, 1913.)

YOU, THEREFORE, ARE HEREBY COMMANDED That such execution and further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the sixth day of March, in the year of our Lord one thousand, nine hundred and thirteen.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Amount of costs allowed and taxed in favor of the appellee and against the appellants as per annexed Bill of Items, taxed in detail: \$21.75.

F. D. MONCKTON,

Clerk.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 19, 1913. Angus McBride, Clerk. By V. A. Paine, Deputy.

Plaintiff's Exhibit "D." S-49. [24]

**Plaintiff's Exhibit "F"—Certificate of Levy of
Writ of Attachment in Karlson vs. Thompson
et al.**

*In the District Court for the Territory of Alaska,
Third Division.*

654.

KARL KARLSON,

Plaintiff,

vs.

ERI THOMPSON and DAVE WALLACE, Co-
partners as WALLACE & THOMPSON,
Defendants.

**CERTIFICATE OF LEVY OF WRIT OF
ATTACHMENT.**

I hereby certify and make oath, that as special deputy United States marshal, specially authorized, appointed and deputed to *serve levy* a certain Writ of Attachment, hereto annexed, that I levied the same upon the Battle Axe association placer claim on Thunder Creek, in Cook Inlet Precinct and Recording District, on the 22 day of Sept. 1912, by posting a copy of the same in a conspicuous place upon said claim to wit, upon by Posting a copy of the same on the Battle Axe group on Thunder Creek in the Cook Inlet Precinct.

H. BAHRENBURG.

Subscribed and sworn to before me this 23d day of
November, 1912.

[Seal]

LEE VAN SLYKE,
Notary Public Territory of Alaska.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 3, 1912. Angus McBride, Clerk. By V. A. Paine, Deputy.

Filed for record July 25, 1914, at 10 min. past 4 P. M., Volume 1 of Miscellaneous, Page 73, Records of Cook Inlet.

LEE VAN SLYKE,

Commissioner and Ex-Officio Recorder.

Plaintiff's Exhibit "F." Cause S-49. [25]

**Plaintiff's Exhibit "E"—Certificate of Attachment
of Real Property in Snook vs. Thompson et al.**

Plaintiff's Exhibit "E"—Cause S-49.

*In the District Court for the Territory of Alaska,
Third Division.*

WILLIAM C. SNOOK,

Plaintiff,

vs.

ERI THOMPSON and DAVE WALLACE, Copart-
ners as WALLACE AND THOMPSON,
Defendants.

**CERTIFICATE OF ATTACHMENT OF REAL
PROPERTY.**

United States of America,
Territory of Alaska,—ss.

Henry Barrenberg, being duly sworn, says he is a citizen of the United States, over twenty-one years of age, and a resident of the Territory of Alaska; that as special deputy United States Marshal he attached the interest of the defendants in the

Battle Axe association placer mining claim of 160 acres, situated on Thunder Creek, Cook Inlet Precinct, Alaska, pursuant to a writ of attachment issued in the above-entitled action out of the clerk's office of the above-entitled court, on the 22th day of Sept. 1912.

H. BAHRENBURG.

Sworn to and subscribed before me this 23d day of Nov., 1912.

[Seal]

LEE VAN SLYKE,
Notary Public.

Filed in the District Court, Territory of Alaska, Third Division. Dec. 3, 1912. Angus McBride, Clerk. By V. A. Paine, Deputy.

Filed for record July 25, 1914, at 11 Min. past 4 P. M. Volume 1 of Miscellaneous, page 74, Records of Cook Inlet.

LEE VAN SLYKE,
Commissioner and Ex-officio Recorder. [27]

**Plaintiff's Exhibit "G"—Letter, July 14, 1912,
Snook to Ellis.**

Hope, Alaska, July 14th, 1912.

Mr. Ellis,

Thunder Creek, Alaska.

Dear Sir:—

Following the advice of Mr. McAdams, I am writing you in regard to Mr. Thompson and Thunder Creek. Mr. M. tells me you have bought Thunder Creek of Mr. Thompson and that the money is tied up by the courts to pay labor claims. Is this so?

I have a claim against Thompson for labor on Thunder Creek of \$382.00 with Int. and costs. Am supporting a family and cannot afford to lose this if there is any show to get it. Will you tell me in what Bank the money is deposited and any pointers you can give me will be appreciated. I can refer you to Henry Bahrenburg.

Very respectfully,

(Signed) WM. C. SNOOK.

**Plaintiff's Exhibit "G"—Letter, August 10, 1912,
Ellis to Snook.**

On the back of the above is written the following:

Thunder Creek, Aug. 10, 1912.

W. C. Snook,

Hope, Alaska,

Dear Sir:—

Your favor of July 14 at hand in reply will say that I would like very much to help you get your money but do not know of any way unless you are a party to that suit. They have a judgment against Thompson and he has appealed and put up a cash bond. I am paying the money to him or rather to Cummings through the Bank of Seward. The last ~~cash~~ payment will be made this fall, Oct. 15th, I believe, if you are one of those interested in the judgment you will be protected, if not I would advise you to sue and get judgment. regards to Mr. McAdams. Think I may be in Hope this fall. Will look you up.

(Signed) M. A. ELLIS. [29]

**Plaintiff's Exhibit "H"—Letter, September 6, 1913,
Van Slyke to Morford.**

Susitna, Alaska, Sept., 6th, 1913.

Mr. S. O. Morford,
Attorney at Law,
Seward, Alaska.

Dear Sir:

Yours received mail of Aug. 28th, and will say the deed you speak of has been properly indexed in the Index to deeds, the reason it was *spread* in Powers of Attorneys was that I had the records of deeds with me in Chicago.

The cases you speak of were not filed here but in the District Court, I thought I spoke *to as* to them this spring in your office, but guess I forgot to do so, I think the parties were Snooks in fact I know he was one of them and I think the other was a man by name of Karlson, I swore the special Deputy Marshall as to the service.

I just looked it up and Karlson is the other Plaintiff.

We have also had a lovely summer, but it would have been better for the Camp if we had had some rain as they have been short of water to sluice with.

With best wishes I am yours truly,

LEE VAN SLYKE.

Plaintiff's Exhibit "H." S-49. [30]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S./49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Stipulation Relating to Transcript of Evidence.

It is hereby stipulated between the parties to this cause that the annexed and foregoing official stenographer's transcript of evidence herein may be certified by the Judge of this court, who tried this cause, to be a true and complete transcript of all the evidence adduced or offered on the trial herein, together with the original exhibits offered and admitted in evidence by the plaintiff and defendants at the trial or true copies thereof (except as hereinafter agreed; and may thereupon be filed as such by the clerk of this court, in making up, certifying and transmitting the record on appeal herein, may include said original transcript of evidence in such record on appeal as a part thereof, with the consent of the trial Judge, instead of making a copy thereof as a part of the record on appeal.

It is further stipulated that in lieu of Plaintiff's Exhibit "C" in this cause, copies of the following three records may be substituted therefor and constitute said exhibit, namely:

1. The notice of lien of Karl Karlson in Case #S/21.

2. The judgment in Case #233 entitled Thomas H. Meredith vs. Dave Wallace and Eri Thompson, copartners.

3. The judgment in case #S/9 entitled J. L. Reed vs. Eri Thompson and J. M. Cummings.

Further, that the clerk of this court, in making up, certifying and transmitting the record on appeal herein may substitute the said three records in lieu of said exhibit "C."

J. L. REED,

Plaintiff in Pro. Per.

S. O. MORFORD and

J. J. FINNEGAN,

Attys. for Deft. Ellis.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, April 21, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [31]

RECORDER'S OFFICE FOR COOK INLET
PRECINCT.

S—21.

KARL KARLSON,

Claimant,

vs.

DAVE WALLACE, JOE LE CLAIR et al.,

Defendants.

Mechanic's Lien in Karlson vs. Wallace et al.

Notice is hereby given that Karl Karlson claims a lien upon eight mining claims situate and beginning

at the mouth of Thunder Creek, each lying 330 feet upon each side of Thunder Creek and running upstream and adjoining each other, located and recorded by Joe Leclair in his own name and as agent for Dave Wallace and others whose names are unknown to claimant, the same being in and recorded in the Cook Inlet Precinct and Recording District and Territory of Alaska for work and labor done upon buildings in said precinct and territory used, for and in the development of said mining claims.

That the names of the owners, or reputed owners thereof are Dave Wallace, Joe LeClair and others unknown to claimant, but which appear of record in the recorder's office of said recording district to which reference is made that said names might be made a part hereof; That Dave Wallace employed claimant; that the following is a true statement of the demand and contract of said claimant for work, to wit: five months and one-quarter of a month at \$100.00 per month, or a total sum of \$525.00; that the same was done and performed between and inclusive of the 8th day of October, 1906, and the 16th day of March, 1907, and the rendition of said services was closed on the 16th day of March, 1907; that thirty days have not elapsed since that time; that the amount of claimant's demand for said work and labor is \$525.00; that no part thereof has been paid, and that there is now due and unpaid, after deducting all just credits and off-sets the sum of \$525.00 in which amount claimant claims a lien upon said property. [32]

United States of America,
Territory of Alaska,—ss.

Karl Karlson, being first duly sworn, says that he is the claimant named in the foregoing claim, that he has read the same and knows the contents thereof, and believes the same to be true.

KARL KARLSON.

Subscribed and sworn to before me this 12th day of April, 1907.

[Notarial Seal]

J. L. REED,

Notary Public in and for the Territory of Alaska,
Residing at Seward.

Filed in the District Court, Territory of Alaska,
Third Division. Jul. 13, 1914. Arthur Lang,
Clerk. By Chas. A. Hand, Deputy.

District of Alaska,

Cook Inlet Precinct, and Recording District,—ss.

The within instrument was filed for record at 5 o'clock P. M., April 29, 1907, and duly recorded in Book 1 liens on page 73 of the records of said district.

JNO. GOODELL,

District Recorder. [33]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 233.

THOMAS H. MEREDITH,

Plaintiff,

vs.

DAVE WALLACE and ERI THOMPSON, Copart-
ners, as WALLACE and THOMPSON,

Defendants.

Judgment in Meredith vs. Wallace, et al.

This cause coming on regularly for trial on the 5th day of April, 1910, E. E. Ritchie and J. L. Reed, appearing as counsel for plaintiff, and S. O. Morford, Esq., for the defendant Eri Thompson. A trial by jury having been waived by the parties, the cause was tried by the Court without a jury, whereupon witnesses on the part of the plaintiff and defendant were duly sworn and examined and the affidavit of S. O. Morford, Esq., as to what the defendant Eri Thompson would testify if present, and documentary evidence introduced by plaintiff and the evidence being closed, the cause was submitted to the Court for consideration, and decision; and, after deliberation thereon, the Court files its findings of fact and conclusions of law in writing, and orders that judgment be entered herein in favor of the plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that Thomas H. Meredith, the plaintiff, do have and re-

cover, of and from the defendants Dave Wallace and Eri Thompson, copartners, jointly and severally, the sum of One Thousand Five Hundred and Ninety-eight Dollars and Eighty Cents (\$1,598.80), with interest thereon at the rate of eight per cent per annum from the date hereof until paid, together with the plaintiff's costs and disbursements incurred in the action, amounting to the sum of \$32.65.

Dated this 25th day of April, A. D. 1910.

PETER D. OVERFIELD,

District Judge. [34]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. April 25th, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 5, page 824. Plaintiff's Exhibit "A." Cause No. S-9. [35]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S.—9.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Judgment in Reed v. Thompson, et al.

This cause came on for hearing on the 17th day of February, A. D. 1912, and was heard upon the amended complaint, answers, reply, exhibits, depositions, affidavit, proof in the cause and arguments

of counsel and the cause was submitted to the Court for consideration and decision, and after deliberation thereon and the Court having rendered its decision therein, files its findings of fact and conclusions of law in writing.

Wherefore, it is by the Court ordered, adjudged and decreed that the conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings purporting to convey to J. M. Cummings the following described property, situate, lying and being in Susitna, Cook Inlet Precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

That certain placer mining claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct.

An undivided one-half interest in and to that certain saloon situated in the Town of Susitna, Alaska, known as Thompson and Price's saloon; together with and including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon is situated.

That certain log house adjacent to John Jones' bath-house and lying between said bath-house and the general merchandise store of H. W. Nagley, in said Susitna; together with all fixtures and chattels therein contained, owned by said first party; and also that certain log cabin situated in the rear of said log house, with all chattels or other property therein contained.

—was made with intent to hinder, delay and defraud the creditors of the said Eri Thompson, and is void as against plaintiff's judgment rendered in Cause No. 233, entitled Thomas H. Meredith, plaintiff, vs. Dave Wallace and Eri Thompson, copartners, as Wallace and Thompson and as against plaintiff in this action.

It is further ordered, adjudged and decreed that plaintiff be [36] and is hereby declared and adjudged to have a valid lien under his judgment given and entered in cause No. 233, entitled Thomas H. Meredith, plaintiff, vs. Dave Wallace and Eri Thompson, copartners as Wallace and Thompson, and in this action upon the real property described in said purported conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings, described as follows, to wit, situated, lying and being in Susitna, Cook Inlet Precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

That certain placer mining claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct.

An undivided one-half interest in and to that certain saloon building situated in the town of Susitna, Alaska, known as Thompson and Price's saloon; and the lot or parcel of land whereon said saloon building is situated.

And that said lien commences and dates from the 22d day of May, 1910, and it is hereby adjudged that the said described real property be and is subject to

plaintiff's lien, and that the filing and recording of said purported conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings, is hereby cancelled, vacated and set aside in so far as the same conflicts with plaintiff's judgment or rights thereunder of plaintiff's lien.

And it is further ordered, adjudged and decreed that the plaintiff in this action is at liberty to proceed upon his executions heretofore issued upon the judgment in cause No. 233, entitled Thomas H. Meredith, plaintiff, vs. Dave Wallace and Eri Thompson, copartners as Wallace and Thompson, or to issue another execution and combine in one execution the principal and interest and attorneys' fees and costs of suits and expenses of sale and disbursements in Cause No. 233 and in this action, as he may be advised; and should plaintiff so elect to proceed under one execution, he shall after deducting the expenses of sale, costs, disbursements and attorney fee of this action, apply the surplus to the satisfaction of his judgment in Cause No. 233.

Judgment is also rendered against defendant Eri Thompson and [37] J. M. Cummings for the costs and accruing costs and disbursements of this action, taxed at \$86.60, for which an execution will issue.

Done in open court this 4th day of May, 1912.

EDWARD E. CUSHMAN,

District Judge.

Entered Court Journal No. 6, page No. 784.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 4th, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [38]

Defendant's Exhibit No. 1—Agreement, December 7, 1911, Between Cummings and Harper.

THIS AGREEMENT OF MINING OPTION,
Made and entered into this 7th day of December,
A. D. 1911,

BETWEEN J. M. Cummings, of Seward, Alaska,
the party of the first part, and Al. Harper, of the
same place, the party of the second part,

WITNESSETH: That the said party of the first
part, in consideration of the sum of One Dollar
(\$1.00), lawful money of the United States of Amer-
ica, paid to the party of the first part by the party
of the second part, the receipt whereof is hereby
acknowledged, and the further consideration of the
covenants and agreements on the part of the said
party of the second part, hereinafter contained,
agrees to sell and convey unto the said party of the
second part, his heirs and assigns, the following de-
scribed mining location, to wit:

THE BATTLE AXE ASSOCIATION PLACER
CLAIM situate on Thunder Creek, tributary to
Cache Creek, in Cook Inlet mining precinct, Terri-
tory of Alaska, comprising about One Hundred and
Sixty (160) acres,

For the Sum of Ten Thousand Dollars (\$10,000)
lawful money of the United States of America, to be
paid by the party of the second part to the party of
the first part, as follows, to wit:

The sum of Four Thousand Dollars (\$4000.00) on
or before January 15th, 1912,

And the further Sum of Three Thousand Dollars (\$3000.00) on or before July 15th, 1912,

And the further sum of Three Thousand Dollars (\$3000.00) on or before September 1st, 1912.

All deferred payments to be made at the Bank of Seward, Seward, Alaska.

In the event of failure to comply with any of the terms hereof by the said party of the second part, the said party of the first part shall be relieved from all obligations, in law or in equity, to convey said property, and shall have the immediate right [39] of possession, and the said party of the second part shall forfeit all right thereto, and all payments made thereon as full, complete and liquidated damages.

Upon the final payment by the party of the second part to the party of the first part, the party of the first part shall execute and deliver a proper deed of release and conveyance to the party of the second part, of said mining claim.

And it is further understood and agreed by and between the parties hereto, that should the said party of the second part fail to make any of the said deferred payments, at the time and in the manner herein provided, then said party of the first part, at his option, has the right to declare this agreement null and void, upon ten days' notice, in writing, to the party of the second part, filed with said Bank of Seward.

And *it understood* that the stipulations aforesaid are to apply to and bind the heirs, administrators, executors and assigns of the respective parties.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals, in duplicate, the day and year in this agreement first above written.

J. M. CUMMINGS. (Seal)

Witness to Sig. J. M. C.:

S. O. MORFORD,

CURTIS R. MORFORD.

Lewiston, Idaho, December 19, 1911.

For the sum of One Dollar (\$1.00) the receipt whereof is hereby acknowledged, and other valuable considerations, I hereby sell, assign, transfer and set over unto M. A. Ellis, the foregoing contract, or option, he assuming all the liabilities, covenants and obligations therein expressed *to kept* and performed by myself.

AL. HARPER.

Witnesses:

DWIGHT E. HODGE.

Defendant's Exhibit #1. S—49. [40]

**Defendant's Exhibit No. 2—Abstract of Title of
Battle Axe Association Group, etc.**

ABSTRACT OF TITLE OF THE BATTLE
AXE ASSOCIATION GROUP
AS APPEARS OF RECORD IN THE COOK IN-
LET PRECINCT,
THIRD DIVISION, TERRITORY OF ALASKA.
SEPTEMBER 7th, 1912.

Defendant's Exhibit No. 2. Cause S-49. [41]

POWER OF ATTORNEY.

From, Walter James, Eugene Morrison, John Pull-
man, Eri Thompson, D. E. Wallace, Fred Alex-
ander and M. B. Anthony to Joseph LeClair of
Seward, Alaska.

To locate, stake and record for us and each of us
lode claim, placer mining ground, coal claims, tim-
ber land, mill sites or any other valuable mining or
mineral lands in the Territory of Alaska, and hav-
ing located the same to bargain, sell, grant, release
and convey the same or any part thereof, entire or
in separate parcels, to make proper deeds, leases,
or other instruments in writing affecting the same,
to seal, sign and deliver the same to such person or
persons as our said Attorney may desire, to receive
and receipt in ours or each of our names any sum or
sums of money for the same as our said Attorney
may desire, hereby giving and granting unto our
said Attorney full power to do and perform all and
every act and thing whatsoever requisite and neces-
sary to be done in and about the premises as fully

to all intents and purposes as we might or could do if personally present, hereby ratifying and confirming all that our said Attorney shall lawfully do or cause to be done by virtue of these presents.

This Power of Attorney shall be in force and irrevocable for the period of five years.

Dated January A. D. 1906.

Signed:

WALTER JAMES.
EUGENE MORRISON.
JOHN PULLMAN.
ERI THOMPSON.
D. E. WALLACE.
FRED ALEXANDER.
M. B. ANTHONY.

Witnessed in presence of:

H. H. HILDRETH.

S. M. GRAFF.

Acknowledged before H. H. Hildreth, United States Commissioner, Third Division, Territory of Alaska, residing at Seward. Acknowledgment taken Jan. 23d, 1906.

Filed for record April 1, 1906, 2 P. M., and recorded in Vol. 1, Mining Locs., at page 246.

[Seal]

JOHN GOODELL,

Dist. Rec. [42]

NOTICE OF PLACER LOCATION.

Known as Battle Ax Group, on Thunder Creek a tributary of Cache Creek, Cook Inlet Precinct and Recording District, Third Div., Territory of Alaska.

Located Feb. 24th, 1906.

Filed for record April 1, 1906, 2 P. M. and recorded
in Vol. 1, page 249, Min. Locs.

Locators:

WALTER JAMES.

JOHN PULLMAN.

ERI THOMPSON.

D. E. WALLACE.

FRED ALEXANDER.

M. B. ANTHONY.

JOS. LeCLAIR.

EUGENE MORRISON.

By JOE LeCLAIR,

Attorney in Fact.

JOHN GOODELL,

Dist. Recorder. [43]

DEED OF MINING CLAIM.

This Indenture made this 14th day of January, 1908, between Walter James, Eugene Morrison, John Sullivan, Eri Thompson, D. E Wallace, Fred Alexander and W. B. Anthony, by their Attorney in fact Joe LeClair and Joe LeClair the parties of the first part, and John Sheridan of Seward, Alaska, the party of the second part.

Consideration \$100.00, lawful money of the United States, to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged.

Release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, the following described tract of land, situated, lying and being in the Cook Inlet Recording District,

Alaska, particularly bounded and described as follows, to-wit:

An undivided one half interest in and to that certain Association placer claim consisting of 160 acres known as the Battle Ax group, situated on Thunder Creek, a tributary of Cache Creek, a tributary of the Kahiltna River in the Cook Inlet Recording District, Alaska, the Location Notice of which dated Feb. 24, 1906, is recorded on page 249 of Book I—of Min. Loc. of said Recording District.

Signed:

WALTER JAMES. Seal.

EUGENE MORRISON. “

JOHN SULLIVAN. “

ERI THOMPSON. “

D. E. WALLACE. “

FRED ALEXANDER. “

W. B. ANTHONY. “

By Their Attorney in Fact,

JOE LeCLAIR.

JOE LeCLAIR. Seal.

Signed, Sealed and Delivered in Presence of:

WM. H. WHITTLESEY.

JOHN KUSTWIN.

Acknowledged Jan. 14th, 1908, at Valdez, Alaska, before Wm. H. Whittlesey, Notary Public, Ter. of Alaska, residing at Valdez. For Acknowledgment of this deed, see page 201.

Recorded Feb. 6th, 1908, at 4:30 P. M. in Vol. I of Deeds, at page 197, records of Cook Inlet Precinct.

(Seal)

J. GOODELL,

Dist. Rec. [44]

DEED.

Dated January 14th, 1908.

Between Walter James, Eugene Morrison, John Sullivan, Eri Thompson, D. E. Wallace, Fred Alexander, by their and each of their Attorney in fact Joe LeClair and Joe LeClair the parties of the first part and M. B. Anthony the party of the second part.

Consideration One Hundred Dollars lawful money of the United States to them in hand paid by party of second part, receipt acknowledged.

Forever Quit-Claim unto the party of the second part, his heirs and assigns the following lot, parcel or tract of land situated, lying and being in the Cook Inlet Recording District, Alaska, particularly described as follows, to wit:

All of their and each of their interest in and to that certain Association placer claim, consisting of 160 Acres, known as the Battle Ax Group, situated on Thunder Creek, a tributary of Cache Creek, a tributary of Kahiltna River in the Cook Inlet Recording District, Alaska, the location Notice of which Claim dated Feb.—14—1906 is recorded in Vol. I at Page 249 of Min. Loc., of the records of said Recording District.

Signed:

WALTER JAMES. (Seal)

EUGENE MORRISON. “

JOHN SULLIVAN. “

ERI THOMPSON. “

D. E. WALLACE. “

FRED ALEXANDER. “

By Their Attorney in Fact,
JOE LeCLAIR.

JOE LeCLAIR.

Witnesses:

WM. H. WHITTLESEY.

JOHN KUSTWIN.

Acknowledged Jan. 14th, 1908, before Wm. H. Whittlesey, Notary Public, Ter. Alaska, residing at Valdez.

Filed for record Feb. 6th, 1908, at 4:30 P. M., and recorded in Vol. I, Deeds, at page 198, Records of Cook Inlet Precinct and Recording Dist.

(Seal)

J. GOODELL,

Dist. Recorder. [45]

DEED.

Dated Jan. 15, A. D. 1908.

Between W. B. Anthony of Seward, Alaska, party of first part, and Joe LeClair of Seward, Alaska, the party of the second part.

Consideration—One Hundred Dollars lawful money of United States to him in hand paid, receipt acknowledged, does hereby remise, release, and forever Quit-Claim unto the said party of the second part, his heirs and assigns the following described tract, lot or parcel of land, situated and lying

and being in the Cook Inlet Recording District, bounded and described as follows, to wit:

An undivided one half interest in and to that certain Association placer claim consisting of 160 acres known as the Battle Ax Group, situated on Thunder Creek a tributary of Cache Creek, a tributary of Kahiltna River in the Cook Inlet Recording District, Alaska, the loc. Notice of which claim dated Feb. 24, 1906, is recorded on page 249 of Book I of Min. Loc. of the records of said Recording District.

Signed:

M. B. ANTHONY.

Witnesses:

WM. H. WHITTLESEY.

ERI THOMPSON.

Acknowledged Jan. 15th, A. D. 1908, before Wm. H. Whittlesey, a Notary Public, Territory of Alaska, Residing at Valdez.

Filed for record March 6, 1908, at 2 P. M., and recorded in Vol. 1, Deeds, at page 209, Records of Cook Inlet Precinct.

[Seal]

J. GOODELL,
Dist. Rec. [46]

DEED.

Dated 6th day of March, A. D. 1908.

Between Joe LeClair and John Pullman, the parties of the first part, and Joe LeClair, Sr., of Detroit, Mich., the party of the second part.

Consideration—One Dollar of the United States of America, to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents, remise, re-

lease and forever Quit-Claim unto the said party of the second part, and to his heirs and assigns the following tract, parcel or lot of land situate, lying and being in the Cook Inlet Recording District, described as follows, to wit:

An undivided one half interest in and to that certain Association Mining Claim of 160 acres known as the Battle Ax, Situated on Thunder Creek, a tributary of Cache Creek in Cook Inlet Precinct, Alaska, the Location Notice of which claim being of record page 249 of Book I—records of said precinct.

Signed:

JOE LeCLAIR. Seal

JOHN PULLMAN. Seal

By JOE LeCLAIR,
Atty. in Fact.

Witnessed:

G. W. PALMER.

JOHN GOODELL.

Acknowledged March 6th, 1908, before John Goodell, U. S. Commissioner.

Filed for record March 6th, 1908, and recorded in Vol. I, Deeds, at page 210.

[Seal]

J. GOODELL,

Dist. Rec. Cook Inlet Precinct. [47]

DEED.

Dated March 3d, 1908.

Between John Sheridan of Seward, Alaska, the party of the first part, and Eri Thompson, the party of the second part.

Consideration.—One hundred dollars, Gold Coin

of the United States, the receipt of which is hereby acknowledged, has granted, bargained, sold, remised, released and forever Quitclaimed unto the said party of the second part, and to his heirs and assigns, the undivided one-half interest in and to that certain Association placer mining claim consisting of one hundred and sixty acres, known as the "Battle Ax" Group situated on Thunder Creek a tributary of Cache Creek, a tributary of Kahiltna River in the Cook Inlet Recording District, Territory of Alaska. The location Notice of which dated Feb. 24th, 1906, is recorded on page 249 of Book I of Mining Locations of Cook Inlet Recording Precinct, said Territory of Alaska.

Signed:

JOHN SHERIDAN. (Seal)

Witnessed:

S. O. MORFORD.

CURTIS R. MORFORD.

Acknowledged Third day March, 1908, before S. O. Morford, Notary Public, District of Alaska.

Filed for record Dec. 14, 1908, request of Eri Thompson at 11:50 A. M. and recorded in Vol. I, Deeds, at page 278.

[Seal]

H. S. FARRIS,

Recorder, Cook Inlet Precinct.

[48]

DEED.

Dated 11th day of July, 1908.

Between Joe LeClair, Sr., of Detroit, Michigan and Joe LeClair, Jr., of Susitna, Alaska, Attorney in fact, the parties of the first part, and Eri Thomp-

son, of Susitna, Alaska, the party of the second part, for and in consideration of the sum of One and no/100 Dollars Gold Coin of the United States of America to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged have granted, bargained, sold, remised, released and forever Quit-Claimed unto the said party of the second part, and to his heirs and assigns, the following described property, to wit: One-half interest (undivided) in and to that certain Association placer mining claim, consisting of one hundred and sixty acres known as "Battle Ax," situated on Thunder Creek, a tributary of Cache Creek, the Cook Inlet Recording Precinct, Territory of Alaska, the Location Notice of said claim is recorded on page 249, of Book I, records of said Precinct.

Signed:

JOE LeCLAIR, Sr. Seal.

By JOE LeCLAIR, Jr.

Attorney in Fact.

Witnessed:

JOHN SHERIDAN,

H. W. NAGLEY.

Not acknowledged.

Filed for record Dec. 14, 1908, at 11:50 A. M. at request of Eri Thompson and recorded in Vol. 1, Deeds, at page 279.

H. S. FARRIS,

Recorder.

QUITCLAIM DEED.

Dated 25th day of October, 1909.

Between Eri Thompson of Susitna, Alaska, the party of the first part, and J. M. Cummings, of Valdez, Alaska, the party of the second part:

Consideration, the sum of One (\$1.00) Dollar, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents remise, release and forever Quitclaim unto the said party of the second part, and to his heirs and assigns the following described property, situate, lying and being in Susitna Cook Inlet Precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

That certain placer Mining Claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct; an undivided one-half interest in and to that certain Saloon situated in the town of Susitna, Alaska, known as Thompson and Price's Saloon; together with and including all fixtures, cigars and liquor license, and the lot or parcel of land whereon said Saloon is situated.

That certain log house adjacent to John Jones' bath house and lying between said bath house and the General Merchandise Store of H. W. Nagley in said Susitna; together with all fixtures and chattels therein contained, owned by said first party and also that certain log cabin situated in the rear of said log house with all chattels or other property therein contained.

To have and to hold all and singular the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever. [50]

Signed:

ERI THOMPSON, (Seal)

Witnessed:

H. S. FARRIS.

WILLARD Y. SCOTT.

Acknowledged 25th day of October, A. D. 1909, before H. S. Farris, a Notary Public in and for the Territory of Alaska, residing at Susitna.

Filed May 22, 1910, at 8:30 P. M., request Eri Thompson.

[Seal]

H. S. F.,
Recorder.

Recorded in Vol. 1, Deeds, at page 424, Records of Cook Inlet Precinct. [51]

United States of America,
Territory of Alaska,—ss.

I, the undersigned clerk of the District Court of the Territory of Alaska, Third Division, do hereby certify that the following is a full and correct copy of the original entry in the judgment docket, Volume I of the District Court Territory of Alaska, Third Division, as the same appears on page 260, at line 7, the same being of record in my office.

Judgment Debtor . . . Thompson Eri & Wallace Dave.

Judgment Creditor Meredith Thos. H.

Principal, \$1,598.80

Amt. of judgment: Interest, 8% from date until paid

Costs, \$32.65

Date of entry in Journal, April 25, 1910. Volume 5,
Page 824.

When docketed: April 29, 1910.

In testimony whereof, I have subscribed my name
and affixed the Seal of the Court at Valdez, Alaska,
this 29th day of April, 1910.

[District Court Seal]

Signed: ED. M. LAKIN,
Clerk.

By Thos. S. Scott,
Deputy.

Filed for record May 22, 1910, at 11:10 P. M., re-
quest of J. L. Reed.

H. S. FARRIS,
District Recorder.

Recorded in Volume 1, page 1, Orders and Judg-
ment Affecting Real Estate. [52]

RECEIPT.

\$4,000.00. Seward, Alaska.

Received of M. A. Ellis, per Charles and Al Har-
per, the sum of Four Thousand Dollars (\$4,000.00)
in full of payment due January 15th, 1912, upon that
certain contract entered into between J. M. Cum-
mings and Al Harper on the 7th day of December,
1911, for the sale of the Battle Axe Association
Placer Claim, situated on Thunder Creek, in the
Cook Inlet Mining Precinct, District of Alaska, con-
taining one hundred and sixty acres; said contract
having been duly assigned and transferred by the
said Al Harper to M. A. Ellis.

Signed: J. M. CUMMINGS.

Acknowledged, before Curtis S. Morford, a Notary

Public in and for the District of Alaska, residing at Seward.

Filed for record March 11th, 1912, at 3 o'clock P. M.

LEE VAN SLYKE,
Commissioner and Ex-officio Recorder, Susitna,
Alaska, Cook Inlet Precinct, Territory of
Alaska.

Recorded in Vol. 1, Miscellaneous, at page 41, Records of said Precinct. [53]

United States of America,
Territory of Alaska,
Cook Inlet Precinct.

I, the undersigned United States Commissioner and Ex-officio Recorder of the Cook Inlet Precinct and Recording District of Alaska, and the legal custodian of Notices of Location and the Records of Transfers of Mining Claims in said district,—

DO HEREBY CERTIFY: That the foregoing abstract of title to the Battle Axe Group of Placer Mining Claims, which abstract contains 12 sheets in all, numbered 1 to 12, inclusive, is full and correct title to said claim or any part of same which appears of record other than those set forth in the foregoing abstract.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at Susitna, Alaska, on this 7th day of September, A. D. 1912.

[Seal of U. S. Commissioner]

Signed: LEE VAN SLYKE,
U. S. Commissioner and Ex-officio Recorder. [54]

Defendant's Exhibit 3—Quitclaim Deed, February 28, 1913, Between Cummings and Ellis.

THIS INDENTURE, made the twenty-eighth day of February, in the year of our Lord one thousand nine hundred and thirteen, between J. M. CUMMINGS, of Seattle, Wash. (formerly of Valdez and Seward, District of Alaska), the party of the first part, and M. A. ELLIS, of Seattle, King County, Wash., the party of the second part, WITNESS-ETH: That the said party of the first part, for and in consideration of the sum of Ten Thousand and 00/100 Dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has sold, remised and forever quit-claimed, and by these presents does sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns the following described property situate, lying and being in the Susitna and Cook Inlet Precinct, Third Judicial Division, District of Alaska, more particularly described as follows to wit: That certain association placer mining claim, consisting of one hundred sixty (160) acres, known as the "Battle Ax Group" situated on Thunder Creek, a tributary to Cache Creek, a tributary to the Kahiltna River, in the Cook Inlet Recording Precinct, District of Alaska; the location notice of which dated February 24th, 1906, is recorded in Volume one (1) on page two hundred forty-nine (249), of Mining Locations, of the records of said Recording District.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

J. M. CUMMINGS. (Seal)

Signed, sealed and delivered in presence of:

ERI THOMPSON.

S. O. MORFORD. [55]

Province of British Columbia,

County of Caribas,

District of Lillooch,—ss.

I, Samuel Gibbs, a Notary Public for the Province of British Columbia, do hereby certify that on this twenty-eighth day of February, A. D. 1913, personally appeared before me J. M. Cummings to me known to be the individual described in and who executed the within instrument, and acknowledged that he executed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 28th day of February, A. D. 1913.

SAMUEL GIBBS,

Notary Public in and for the Province of British
Columbia, Residing at Lillooch.

United States of America,

Territory of Alaska,

Third Division,—ss.

FILED FOR RECORD AT REQUEST of J. E.

Chapman of Thunder Creek Mining Co., on the 28th day of Mar., 1913, at 15 minutes past 8 A. M. and recorded in volume 2 Supp'l of Deeds, page 151 Records of Cook Inlet, Precinct Alaska.

LEE VAN SLYKE,

U. S. Commissioner and Ex-officio Recorder.

H. W. Nagley,

Deputy.

Defendant's Exhibit #3. S-49. [56]

**Defendant's Exhibit 4—Letter, October 11, 1912,
to Clerk of Court.**

October 11, 1912.

Clerk of Court,

Valdez, Alaska.

Dear Sir:—

The copy of complaint in Snooks vs. Thompson et al. just received. Enclosed please find my check for \$1.40 in payment of the same. As soon as you receive return of attachment, please send me a copy of the writ and the return, as I am informed an attachment has been placed upon the property at Susitna.

Very truly yours,

Defendant's Exhibit #4. S-49.

Exhibit—Letter, October 8, 1912, Lakin to Morford.

DEPARTMENT OF JUSTICE.

Office of
CLERK OF THE DISTRICT COURT.

For the Territory of Alaska,
Third Division.

Valdez.

Oct. 8th, 1912.

S. O. Morford, Esq.,
Seward, Alaska.

Dear Sir:

In compliance with your telegram of this date, I enclose herewith a certified copy of the complaint in cause #S-20.

As there has been no return of the Writ of Attachment, I am unable to send certified copy of that or the return.

The charge for the copy sent is \$1.40.

Yours very truly,

ED. M. LAKIN,

Clerk. [57]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S/49.

J. L. REED,

Plaintiff,

vs.

M. A. ELLIS, ERI THOMPSON and J. M. CUM-
MINGS,

Defendants.

Opinion.

In August, 1912, William Snook and Karl Karlson commenced separate actions in this court against the defendant Thompson and one Dave Wallace for labor performed by them in the year 1907 for said Thompson and Wallace on the Battle Ax group of mining claims on Thunder Creek, Cook Inlet recording district, Alaska.

On July 14, 1914, judgment by default was recovered by J. L. Reed, substituted as plaintiff for said Karl Karlson against said Thompson and Wallace for the sum of \$822.30 and costs and on said July 14, 1914, judgment was rendered by default in favor of said Snook against said Thompson and Wallace for the sum of \$582.68 and said judgment was subsequently assigned to the plaintiff Reed, who brings this action to subject the said Battle Ax mining claim to the lien of two certain attachments levied upon said mining claim on the 22d day of September, 1912, in said actions brought by Snook and Karlson.

On the 25th day of October, 1909, the defendant, Eri Thompson, executed a conveyance, in form a quitclaim deed, to the defendant herein, J. M. Cummings, conveying the said Battle Ax mining claim and other property, which said deed was recorded in the office of the recorder at Susitna, in the Cook Inlet recording precinct, Alaska, May 22, 1910.

On April 25, 1910, the above-named plaintiff, J. L. Reed, recovered [58] a judgment against the defendant Eri Thompson and Dave Wallace for the sum of \$1,598.80 and costs, for work and labor per-

formed by plaintiff's assignors on the said Battle Ax mining claim in the year 1907 and on the 22d day of September, 1910, brought an action to set aside the said deed made by Thompson to Cummings on October 25, 1909, as fraudulent and made to hinder and delay creditors. This court adjudged said deed void for fraud. An appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit, and on the 3d day of February, 1913, said judgment was affirmed by said Circuit Court of Appeals. The decision in said cause, entitled Thompson et al. vs. Reed is found in the 202 Federal Reporter at page 870.

On December 7, 1911, said defendant Cummings granted an option to purchase said Battle Ax mining claim to one Al Harper for the sum of \$10,000 to be paid as follows: The sum of \$4,000 on or before January 15, 1912; the sum of \$3,000 on or before July 15, 1912, and the further sum of \$3,000 on or before September 1, 1912, payments to be made at the Bank of Seward, Alaska. On December 19, 1911, said Al Harper assigned all his interest in and to said option to the defendant M. A. Ellis.

The testimony shows that Ellis made the first payment of \$4,000 in February, 1912. The second payment of \$3,000 was made in August, 1912. The final payment of \$3,000 was made in February, 1913, and Cummings executed a deed to Ellis on February 28, 1913, for said Battle Ax mining claim.

This present action is brought to subject the said Battle Ax mining claim to the lien of said two attachments levied on the ground on September 22, 1912.

Said attachments were made by the special officer, by posting [59] certified copies of the writs of attachment in a conspicuous place on said mining claim.

Defendants claim that no lien was ever acquired thereby for the reason among others that no certificate was filed with the recorder in said precinct within ten days after the attachment as provided in section 974, Compiled Laws of Alaska. Said section reads:—

“If real property be attached, the marshal shall make a certificate containing the title of the cause, the names of the parties, a description of such real property, and a statement that the same has been attached at the action of the plaintiff, and the date thereof. Within ten days from the date of the attachment, the marshal shall deliver such certificate to the commissioner as ex-officio recorder of the recording district in which said real property is situated, who shall file the same in his office and record it in a book to be kept for that purpose. When such certificate is so filed for record the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment, but if filed afterwards it shall only attach, as against third persons, from the date of such subsequent filing. * * *

If Thompson owned the ground, however, or had any interest therein, it would seem that such attachments would bind his interest, whether or not the notice was filed as provided in section 974.

Plaintiff alleges in his amended complaint that the defendant Ellis had full notice and knowledge of the fraudulent character of the deed from Thompson to Cummings and of plaintiff's claims and attachment. If this be true, it would seem that he, Ellis, stood in no different position from Cummings.

Defendant Ellis, by his answer, denies that he had any such notice or knowledge, but his own testimony clearly shows that he knew of the action pending to declare said deed from Thompson to Cummings void; that he paid over a considerable portion of the purchase price owing to Cummings to a trustee, to be held pending the final determination of said action, and that when said action was finally determined adversely to Cummings, said money was paid to the plaintiff Reed in satisfaction of the former judgment.

It also appears from the testimony of Ellis that plaintiff's [60] assignor, Snook, wrote to Ellis on July 14, 1912, asking him about his payments to be made to Cummings, and notifying Ellis that he, Snook, was also a creditor of Thompson's for labor done on said mining claim, and that he wanted to collect his money. On August 10, 1912, Ellis acknowledged receipt of said letter and wrote Snook that the last payment on said motion was to be made October 15th, and further wrote:— "I believe if you are one of those interested in the judgment (referring to the Reed judgment, on appeal) you will be protected; if not, I would advise you to sue and get judgment."

Ellis' own testimony also shows that he left the

Battle Ax mining claim, upon which he had been working during the season of 1912, on or about September 3, 1912, and came out to Seward, on the coast, two or three hundred miles distant. While in Seward, in October, 1912, he was informed that notices had been posted on the ground. He testified that he met a man who had worked on the ground, who told him that Henry Behrenberg (the special officer) had posted up a notice on said Battle Ax mining claim, near the camp or cache of said Ellis, but that he did not know just what the notice was, except that it seemed to be some suit filed by Snook against Thompson and Wallace. He says he wrote back to Nagley or Van Slyke, he is not sure which one of them was Commissioner at Susitna Station (a long distance from this ground) and received back a letter, saying that a suit had been started for wages against Thompson and Wallace, and that "it had nothing to do with me" (Ellis). He says he did not go to the ground or send any one there to ascertain what the notices were, but relied upon this letter and upon the advice of S. O. Morford, attorney for defendant Ellis in this case. He also says he relied upon an abstract of title dated September 7, 1912.

It would thus seem that Ellis, while not chargeable with the constructive notice provided for in section 974, that is, by the [61] filing of the certificates of the attachment in the commissioner's or recorder's office, had actual notice and knowledge of the whole affair—of the attack on the deed from Thompson to Cummings; the suit then pending on

appeal; the fact that Snook had a claim for wages against Thompson for work on said ground in 1907, for which he himself had advised Snook to bring suit and get judgment; and such notice of posting on the ground, in view of all the circumstances in this case, was not only sufficient to put him on inquiry, but brought home to him actual notice of plaintiff's rights. And if it be contended that all of these circumstances did not constitute "express" actual notice, it would still be gross or culpable negligence on Ellis' part not to have ascertained the facts as to the Snook claim, before he made the final payment and took the deed from Cummings. (See *Tobey vs. Kilbourne*, 222 Federal, 764.) He had not yet secured his deed from Cummings, nor made the final payment, out of which he could have amply protected himself, and still have regard for the rights of others.

It is difficult to see how Ellis stands in any different position from Cummings, and Cummings' deed from Thompson was declared void as to creditors. Ellis knew that such was the final judgment and that it was his money that paid the creditors of Thompson, and all this before he made his final payment or received his deed.

It would seem as though Ellis was honest in his belief and that his was a mistake of law, but this cannot relieve him from liability to those who were bona fide creditors of Thompson's, with whom Ellis was in privity as to this mining claim, and had notice and knowledge of their rights.

In the case of *Bank of Colfax vs. Richardson*, 34

Oregon, at page 540, Mr. Justice Bean, in a carefully considered opinion, says: [62]

“And, finally, it is contended that the judgments upon which this suit was brought are void because the attached property had been transferred by the Richardsons to their codefendants before the commencement of the several actions at law, and hence it is claimed that they had no interest therein which could be seized on attachment, and so the court did not obtain jurisdiction to render any judgment whatever. A sufficient answer to this position is that the complaint in this suit avers that such transfer was made for the purpose of defrauding creditors, and as to the plaintiff it is, therefore, only an apparent, and not a real transfer. As to it, the land still belonged to the fraudulent grantor, and was as much subject to attachment as though the fraudulent deed had never been made: *Waples*, Attachm. Sec. 249; *Mulock v. Wilson*, 19 Colo. 296 (35 Pac. 532); *Keene v. Sallenbach*, 15 Neb. 200 (18 N. W. 75); *Williams v. Michenor*, 11 N. J. Eq. 520; *Greenway v. Thomas*, 14 Ill. 271; *Dewey v. Eckert*, 62 Ill. 218.”

In *Bouvier's Law Dictionary*, (Rawle's Third Revision) in Volume 3, page 2368, under the heading “Notice,” it is said:

“Actual notice exists when knowledge is actually brought home to the party to be affected by it. This statement is criticised, as being too narrow, in *Wade*, Notice 4. This writer divides

actual knowledge into two classes, express and implied; the former includes all knowledge of a degree above that which depends upon collateral inference, or which imposes upon the party the further duty of inquiry; the latter imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them, choosing to remain ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest; Wade, Notice 5."

I believe the knowledge which Ellis is shown by his own testimony to have had is such as to bring him within the first named class, that of "express" knowledge or notice.

The plaintiff is entitled to have said Battle Ax mining claim subjected to the lien of his judgment in this case, by virtue of his attachments, and the property sold to satisfy the same.

Findings and decree may be so prepared.

Dated this 18th day of November, 1915.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 18, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 370. [63]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Findings of Fact and Conclusions of Law.

It appearing to the satisfaction of the Court by the proofs on file herein that service of summons herein was duly made on the defendant Eri Thompson by publication and the default of said Eri Thompson for pleading or other appearance having been entered herein on the 4th day of June, 1915, and that personal service of the amended complaint was made on the defendants M. A. Ellis and J. M. Cummings and that the said M. A. Ellis and J. M. Cummings having filed their separate answers and that upon the issues joined by the pleadings herein and this cause coming on regularly for trial on the 12th day of November, 1915, and E. E. Ritchie and J. L. Reed appearing as counsel for the plaintiff and S. O. Morford and J. J. Finnegan appearing for the defendant M. A. Ellis and the defendant J. M. Cummings having failed to appear at the trial, the case was tried before the Court, whereupon documentary evidence was then introduced by the plaintiff and the following witnesses were then duly sworn and

testified for and on behalf of the plaintiff, to wit, J. L. Reed, Andrew Beck and Henry Bahrenburg; thereupon, documentary evidence was introduced by and the following witnesses duly sworn and testified for and on behalf of the defendant M. A. Ellis, to wit, M. A. Ellis and S. O. Morford, and the evidence being closed and arguments of counsel heard and the Court being fully advised in the premises, now makes the following findings of fact and conclusions of law herein:

FINDINGS OF FACT:

I.

That on August 7th, 1912, William C. Snook filed an action in this court against the defendant Eri Thompson and one Dave Wallace to recover upon a claim of indebtedness and caused a writ of attachment [64] to be issued out of the clerk's office of said court and thereafter, to wit, on the 22d day of September, 1912, duly levied by the United States marshal upon said Battle Axe mining claims as the property of the defendant Eri Thompson, that thereafter the certificate of said levy was duly filed in the office of the commissioner and recorder in which said claim is situated on the 25th day of July, 1914, and that on the 14th day of July, 1914, judgment was duly entered in this court in favor of the said William C. Snook and against Eri Thompson and Dave Wallace for the sum of \$582.68 with interest accrued and accruing costs and that thereafter said judgment was duly assigned to J. L. Reed, the plaintiff herein.

II.

That on August 14th, 1912, Karl Karlson filed an

action in this court against the defendant Eri Thompson and one Dave Wallace to recover upon a claim of indebtedness and caused to be issued on the same day in said action a writ of attachment, and that thereafter, to wit, on the 22d day of September, 1912, the United States marshal duly levied upon said Battle Axe mining claim as the property of said Eri Thompson, that the certificate of said levy was duly filed in the office of the commissioner and recorder of the precinct in which said claim is situated on the 25th day of July, 1914; that on the 13th day of July, 1914, an assignment of said Karl Karlson's right of action was filed and on the 14th day of July, 1914, pursuant to said attachment a judgment was duly entered in this court in favor of the said J. L. Reed, and against the said Eri Thompson and Dave Wallace for the sum of \$822.30 with interest and accrued and accruing costs and for the sale of the interest of the said Eri Thompson in said attached property to pay said judgment.

III.

That the indebtednesses upon which said judgments are based is for work and labor performed upon the Battle Axe mining claim by the plaintiff's assignors, Snooks and Karlson, during the years 1906 and 1907.

IV.

That on the 25th day of October, 1909, the defendant, Eri [65] Thompson, executed a conveyance, in form a quitclaim deed, to the defendant herein, J. M. Cummings, conveying the said Battle Axe mining claim and other property, which said deed was recorded in the office of the recorder at Susitna, in

the Cook Inlet recording precinct, Alaska, on May 22d, 1910, at 8:30 P. M.

V.

That on the 25th day of April, 1910, the above-named plaintiff, J. L. Reed, recovered a judgment against the defendant Eri Thompson and Dave Wallace for the sum of \$1,598.80 and costs, for work and labor performed by plaintiff's assignors on the said Battle Axe mining claim in the year 1907, and on the 22d day of September, 1910, brought an action to set aside the said deed made by Thompson to Cummings on October 25, 1909, as fraudulent and made to hinder and delay creditors and that this Court adjudged said deed void for fraud. That an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit, and on the 3d day of February, 1913, said judgment was affirmed by said Circuit Court of Appeals.

VI.

That on the 7th day of December, 1911, said defendant Cummings granted an option to purchase said Battle Axe mining claim to one Al Harper for the sum of \$10,000.00, to be paid as follows: The sum of \$4,000.00 on or before January 15, 1912; the sum of \$3,000.00 on or before July 15th, 1912, and the further sum of \$3,000.00 on or before September 1st, 1912, payments to be made at the Bank of Seward, Alaska. That on December 19, 1911, said Al Harper assigned all his interest in and to said option to the defendant M. A. Ellis. That the final payment of \$3,000.00 was made on the 28th day of February, 1913, on which day Cummings executed and delivered a deed to Ellis for said Battle Axe mining

claim, which said deed was filed for record in the office of the recorder of the Cook Inlet recording precinct, Territory of Alaska, on the 28th day of March, 1913.

VII.

That Dave Wallace departed from the Territory of Alaska on [66] or about the month of October, 1907, and that he has not returned to the said Territory of Alaska since said date and that he has no property, real or personal, in said Territory out of which plaintiff could satisfy his judgment.

VIII.

That said conveyance dated October 25th, 1909, conveyed all the property, real and personal, of the defendant Eri Thompson, in the Territory of Alaska, out of which plaintiff could satisfy his judgment herein and was made with intent to defraud the creditors of the said Eri Thompson to wit, the plaintiff's assignors, William C. Snooks and Karl Karlson, and that there was no consideration for the same.

IX.

That the defendant M. A. Ellis had actual notice and knowledge of the fraud and fraudulent intent and all the facts affecting the validity and rendering void the title of his immediate grantor J. M. Cummings as to the plaintiff's rights herein, on and prior to the 28th day of February, 1913.

X.

That the defendant M. A. Ellis had actual notice and knowledge of plaintiff's lien and rights thereunder by virtue of his attachments and levy of attachments of said Battle Axe mining claim on the

22d day of September, 1912, on and prior to the 28th day of February, 1913.

XI.

That the said Dave Wallace and Eri Thompson are insolvent. [67]

CONCLUSIONS OF LAW:

I.

That the conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings, conveyed all the property, real and personal, of the defendant Eri Thompson and was made with the intent to hinder, delay and defraud the creditors of Eri Thompson and the plaintiff's assignors herein to wit, William C. Snook and Karl Karlson and this plaintiff and for which there was no valuable consideration, and that said conveyance is null and void against plaintiff's judgments in causes S-20 and S-21 entitled William C. Snook vs. Eri Thompson and Dave Wallace and Karl Karlson vs. Eri Thompson and Dave Wallace and is null and void as against plaintiff in this action.

II.

That on and prior to the 28th day of February, 1913, the defendant M. A. Ellis had actual notice and knowledge of the fraud and fraudulent intent and all facts affecting the validity and rendering void the title of his immediate grantor J. M. Cummings and of the conveyance dated the 25th day of October, 1909, as affecting plaintiff's rights herein.

III.

That on and prior to the 28th day of February, 1913, the defendant M. A. Ellis had actual notice and knowledge of plaintiff's lien and rights there-

under by virtue of his attachments and levy of attachments of and on said Battle Axe mining claim on the 22d day of September, 1912.

IV.

That the plaintiff has a lien against the real property described in the conveyance executed by Eri Thompson to J. M. Cummings, dated the 25th day of October, 1909, described as follows: situate, lying and being in Susitna, Cook Inlet precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

That certain placer mining claim known as the Battle Axe [68] located on Thunder Creek, a tributary of Cashe Creek, in Cook Inlet mining and recording precinct, by virtue of plaintiff's judgments, attachments and levy of attachments in causes S-20 and S-21, heretofore mentioned, as of and from the date of said levy of attachments, to wit, on the 22d day of September, 1912, and that said liens are superior to and unaffected by the said conveyance between Eri Thompson and J. M. Cummings dated the 25th day of October, 1909, and are superior to and unaffected by said conveyance from J. M. Cummings to M. A. Ellis, dated the 28th day of February, 1913, and recorded in the office of the recorder of Cook Inlet recording precinct, Territory of Alaska, on the 28th day of March, 1913.

V.

That plaintiff has no plain, speedy or adequate remedy at law.

Done in open court at Valdez, Alaska, this 1st day of December, 1915.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 1, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 432. [69]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Judgment.

This cause came on for hearing on the 12th day of November, 1915, and was heard upon the amended complaint, answers, reply, exhibits and proof in the cause and the arguments of counsel and the cause was submitted to the Court for consideration and decision and after deliberation thereon and the Court having rendered its decision therein, files its findings of fact and conclusions of law in writing:

Wherefore, it is by the Court ordered, adjudged and decreed that the conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings purporting to convey to J. M. Cummings the following described property, situate, lying and being in Susitna, Cook Inlet precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

That certain placer mining claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct, was made with intent to hinder, delay and defraud the creditors of the said Eri Thompson and is null and void as against plaintiff's judgments, attachments, and levy of attachments in causes No. S-20, entitled William C. Snook vs. Eri Thompson and Dave Wallace, and No. S-21, entitled Karl Karlson vs. Eri Thompson and Dave Wallace and as against plaintiff as assignee of said causes of action.

It is further ordered, adjudged and decreed that plaintiff be given and he is hereby adjudged to have a valid lien under said judgments in said causes S-20 and S-21 by virtue of the same and his attachments and levy of attachments upon the following described real property described in said purported conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings, described as [70] follows, to wit, situated and lying and being in Susitna, Cook Inlet precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

That certain placer mining claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct; and that said lien commences and dates from the 22d day of September, 1912, and that said described real property be and is subject to plaintiff's lien and that the execution, filing and recording of said purported conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M.

Cummings be and is hereby cancelled, vacated and set aside in so far as the same conflicts with plaintiff's judgments, attachments, levy of attachments, rights, equities or plaintiff's lien thereunder and that the same are unaffected by and are superior to said conveyance:

It is further ordered, adjudged and decreed that the defendant M. A. Ellis had notice and knowledge of the fraud affecting the validity of the conveyance dated the 25th day of October, 1909, between Eri Thompson and J. M. Cummings, and of the fraudulent intent of his immediate grantor J. M. Cummings and of plaintiff's liens, equities and rights by virtue of his judgments, attachments and levy of attachments in causes S-20 and S-21 and that the execution, filing and recording of said conveyance dated the 28th day of February, 1913, between J. M. Cummings and M. A. Ellis is hereby vacated and set aside in so far as the same conflicts with plaintiff's judgments, attachments, levy of attachments, rights, equities or plaintiff's lien thereunder and that the same are superior to and unaffected by said conveyance.

And it is further ordered, adjudged and decreed that the plaintiff in this action is at liberty to proceed by executions to be issued upon the judgments rendered in said causes Nos. S-20 and S-21 heretofore mentioned or to issue another execution and combine in one execution the principal and interest, accrued and accruing costs, attorneys fees and costs of suits and sale and disbursements in said causes Nos. S-20 and S-21 and of and in this action, as he

may be advised; and [71] should plaintiff so elect to proceed under one execution he shall after deducting the expenses of sale, costs, disbursements and attorneys' fees of this action apply the surplus to the satisfaction of his judgments in said causes Nos. S-20 and S-21 pro rata.

Judgment is also rendered against said defendants and each of them for the costs, accrued and accruing costs, attorneys' fees and disbursements of this action, taxed at \$——, for which execution will issue.

Done at Valdez, Alaska, this 1st day of December, 1915, in open court.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 1, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 435. [72]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

**Order Granting Extension of Time in Which to File
Bill of Exceptions.**

Now on this day on the Court's own motion,—

IT IS ORDERED that the defendants have 90 days from the date of the rendition of the judgment, in which to prepare and file a Bill of Exceptions in this cause.

Dated at Valdez, Alaska, this 30th day of November, 1915, as of date November 18, 1915.

FRED M. BROWN,
District Judge.

February, 1915, Term—November 30, 1915—131 Court Day. Tuesday.

Entered Court Journal No. 9, page No. 423.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Nov. 30, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [73]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 1, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, J. M. CUMMINGS and M. A.
ELLIS,

Defendants.

Memorandum of Costs and Disbursements.**DISBURSEMENTS:**

Marshal's Fees.....	\$——
Clerk's Fees....	\$20.40
Witness Fees: Andrew Beck, one day.....	\$——
Henry Bahrenburg, one day.....	\$ 8.00
Publication of Summons.....	\$17.00
Half Reporter's fee, one day.....	\$ 5.00
Docket Fees: Attorney's trial fee.....	\$20.00
<hr/>	
Total.....	\$70.40

United States of America,
Territory of Alaska,
Third Division,—ss.

E. E. Ritchie, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled cause, and as such is better informed relative to the above costs and disbursements, than the said plaintiff. That the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

E. E. RITCHIE.

Subscribed and sworn to before me, this 1st day of December, A. D. 1915.

[Seal]

JOS. L. REED,
Notary Public.

My commission expires April 28, 1918. [74]

To S. O. Morford and J. J. Finnegan, Attorneys for
Defendants:

You will please take notice that on Tuesday, the
7th day of December, A. D. 1915, at the hour of 10
o'clock A. M., plaintiff will apply to the clerk of said
court to have the within memorandum of costs and
disbursements taxed pursuant to the rule of said
Court, in such case made and provided.

J. L. REED, and

E. E. RITCHIE,

Attorneys for Plaintiff.

Service of within memorandum of costs and dis-
bursements, and receipt of a copy thereof acknowl-
edged, this — day of —, A. D. 190—.

_____,
Attorney for _____.

Costs in S-20.... ..\$32.90

Costs in S-21.... ..\$33.85

[Endorsed]: No. S-49. In the District Court, for
the Territory of Alaska, Third Division. J. L. Reed,
Plaintiff, vs. M. A. Ellis et al., Defendants. Mem-
orandum of Costs and Disbursements.

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Motion for New Trial.

Now comes the defendant, M. A. Ellis, by his attorneys, S. O. Morford and J. J. Finnegan, and moves this Court to set aside the decision rendered by the Court in this action and to grant a new trial of this cause upon the following grounds:

I.

That the evidence was insufficient to justify the decision in this: That the plaintiff wholly failed to establish that the defendant Ellis had any implied or express notice of any fraud rendering void the title of his immediate grantor, J. M. Cummings; that plaintiff wholly failed to establish any fraudulent intent upon the part of said Cummings in relation to the conveyance to Ellis.

That said decision is against law in this: It is admitted that the only information Ellis ever received relating to any claim of Snooks against Wallace and Thompson is contained in the Snook's letter (Plaintiff's Exhibit "G.") Said letter does not constitute either implied or express notice. Said decision is against law in this: There was no evidence adduced that Ellis ever knew of any claim of Karlson against Thompson and Wallace. Further, there was no evidence whatsoever adduced that Ellis ever knew, or should have known, that the deed from Thompson was adjudged fraudulent in respect to creditors.

II.

Errors in law occurring at the trial and excepted to by [75] defendant Ellis at the time, to wit:

I. The Court erred in admitting evidence over the objection of defendant of

a. The record in the case of Reed vs. Thompson et al.

b. The Transcript of record on appeal in the case of Reed vs. Thompson et al.,

c. The records in the Snooks and Karlson cases,

for the reason that the two first mentioned records were in no manner binding upon this defendant, and that in the last mentioned the record therein was void for want of jurisdiction.

II. The Court erred in denying defendant's motion for nonsuit.

Dated this 18th day of December, 1915.

S. O. MORFORD,

J. J. FINNEGAN,

Attorneys for Defendant Ellis.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 20, 1915. Arthur Lang, Clerk. By Robert L. Wever, Deputy. [76]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Minute Order Denying Motion for New Trial.

Now, on this day the motion for a new trial in this cause came on for hearing; E. E. Ritchie and J. L. Reed appearing as attorneys for the plaintiff, and J. J. Finnegan and S. O. Morford appearing as attorneys for the defendants and on behalf of motion and after arguments had, and the Court being fully advised in the premises,

IT IS ORDERED, that said motion be and the same is hereby denied, to which order and ruling of the Court, defendants except and exception is allowed.

February, 1916, Term—March 18th—27th Court Day, Saturday.

Entered Court Journal No. 10, page 24. [77]

*In the District Court for the Territory of Alaska,
Third Division.*

S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, J. M. CUMMINGS and M. A.
ELLIS,

Defendants.

Objections to Allowance of Disbursements.

Comes now the defendant M. A. Ellis by his attorneys, S. O. Morford and J. J. Finnegan, and objects to the allowance of certain disbursements requested by plaintiff herein, as follows, to wit:

1. The allowance of the sum of \$17.00 for the publication of summons, for the reason that defend-

ant Ellis was personally served with summons in the above-entitled cause, and made his appearance therein within thirty (30) days after such service.

2. Defendant Ellis objects to the allowance of the sum of \$20.00 for attorney's trial fee therein, for the reason that there is no legal or statutory authority therefor.

S. O. MORFORD and

J. J. FINNEGAN,

Attys. for Defendant M. A. Ellis.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 7, 1915. Arthur Lang, Clerk. By Robert L. Wever, Deputy. [78]

*In the District Court for the Territory of Alaska,
Third Division.*

S-49.

J. L. REED,

Plaintiff,

vs.

M. A. ELLIS, ERI THOMPSON and J. M. CUM-
MINGS,

Defendants.

Minute Order on Objection to Cost Bill.

Now, on this day, the objection to certain items in the cost bill filed by the plaintiff came on to be heard, J. L. Reed and E. E. Ritchie appearing as attorneys for the plaintiff and J. J. Finnegan and S. O. Morford appearing as counsel for the defendant and after arguments had and the Court being fully advised in the premises,

IT IS ORDERED that the objection to the charge of \$17.00 for publication of summons be and the same is hereby overruled, and the objection to the attorneys' fee of \$20.00 is taken under advisement, the Court's decision to be rendered at a later date.

February, 1916, Term—March 18th—27th Court Day, Saturday.

Entered Court Journal No. 10, page No. 24. [79]

*In the District Court for the Territory of Alaska,
Third Division.*

S.-49.

J. L. REED,

Plaintiff,

vs.

M. A. ELLIS, ERI THOMPSON and J. M. CUM-
MINGS,

Defendants.

**Minute Order Overruling Objection to Attorney's
Fee Taxed in Cost Bill.**

This matter having been heard on a day heretofore and the Court having taken said matter under advisement, now ordered that objection to the attorney's fee, taxed in the cost bill in this cause, be and the same is hereby overruled.

February, 1916, Term—March 31—37th Court Day, Friday.

Entered Court Journal No. 10, page No. 51. [80]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S.—49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

**Minute Order Extending Time to Prepare and File
Bill of Exceptions to March 20, 1916.**

Now, on this day, on motion of S. O. Morford, attorney for the defendants: Lyons & Ritchie and J. L. Reed, appearing as attorneys for the plaintiff and consenting thereto,—

IT IS ORDERED that the defendants have until March 20, 1916, to prepare and file the Bill of Exceptions in this cause.

February 21, 6th Court Day, Monday—February, 1916, Term.

Entered Court Journal No. 9, page 480. [81]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—49.

J. L. REED,

Plaintiff,

vs.

M. A. ELLIS, ERI THOMPSON and J. M. CUM-
MINGS,

Defendants.

**Minute Order Extending Time to File Bill of
Exceptions to March 20, 1916, etc.**

On application of defendant, M. A. Ellis, by his attorney, S. O. Morford, for an extension of time to serve and file his bill of exceptions in the above-entitled matter, and good cause appearing to the Court therefor, and it further appearing that the Court heretofore had entered an order giving said Ellis until the 20th day of March, 1916, in which to serve and file his bill of exceptions and that said time has not yet expired, it is ordered that the defendant Ellis have to and including the 15th day of April, 1916, in which to prepare, serve and file his bill of exceptions herein.

Dated this 18th day of March, 1916.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 18, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 10, page No. 25. [82]

*In the District Court for the Territory of Alaska,
Third Division.*

S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

**Minute Order Extending Time to File and Settle
Bill of Exceptions to April 18, 1916.**

Now, on this day, on motion of J. J. Finnegan and
S. O. Morford, attorneys for the defendants,

IT IS ORDERED that the defendants have until
Tuesday, April 18th, 1916, in which to file and settle
bill of exceptions in this cause.

February, 1916, Term—April 14th—49th Court
Day, Friday.

Entered Court Journal No. 10, page No. 69. [83]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

**Minute Order Extending Time to File and Settle Bill
of Exceptions to April 19, 1916.**

Now, on this day, on motion of J. J. Finnegan and
S. O. Morford, attorneys for defendants,

IT IS ORDERED that the defendants have until
Wednesday, April 19, 1916, in which to file and settle
Bill of Exceptions in the above-entitled cause.

February, 1916, Term—April 18th—52d Court
Day, Tuesday.

Entered Court Journal No. 10, page No. 77. [84]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

**Minute Order Extending Time to File and Settle
Bill of Exceptions to April 20, 1916.**

Now, on this day, on motion of J. J. Finnegan and
S. O. Morford, attorneys for the defendants,

IT IS ORDERED that the time to file and settle
bill of exceptions in this cause be extended to April
20, 1916.

February, 1916, Term—April 19th—53d Court
Day, Wednesday.

Entered Court Journal No. 10, page No. 81. [85]

*In the District Court for the Territory of Alaska,
Third Division.*

S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

**Minute Order Extending Time to File and Settle
Bill of Exceptions to April 21, 1916.**

Now, on this day, on motion of J. J. Finnegan and
S. O. Morford, attorneys for the defendants,

IT IS ORDERED that the time in which to file
and settle Bill of Exceptions in this cause be ex-
tended to April 21, 1916.

February, 1916, Term—April 20th—54th Court
Day, Thursday.

Entered Court Journal No. 10, page No. 86. [86]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

M. A. ELLIS, ERI THOMPSON and J. M. CUM-
MINGS,

Defendants.

**Petition for Allowance of Appeal, and Assignment
of Errors.**

To The Honorable FRED M. BROWN, Judge of the
Above-named Court:

Comes now M. A. Ellis, a defendant in the above-
entitled cause, and, feeling himself aggrieved by the
proceedings had therein in the above-entitled court,
and by the judgment rendered and entered therein
by said Court on the 1st day of December, 1915, de-

creeing to the plaintiff in said cause certain relief of an equitable nature against said defendant as therein fully set forth, and further rendering judgment in said plaintiff's favor against said defendant for costs taxed at the sum of \$——, hereby appeals from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and he humbly petitions the above-named District Court for an order allowing his said appeal and fixing the amount of security for the costs of said appeal, to be given by said appellant thereon, and also fixing the amount of a separate bond to be given by him thereon, in order to supersede the effect and enforcement of said judgment appealed from pending the hearing and determination of said appeal.

And said defendant and appellant specifies the following as the errors upon which he will rely on his said appeal, to wit: [87]

ASSIGNMENT OF ERRORS.

1.

That the above-named District Court erred in overruling the demurrer of said defendant Ellis to the amended complaint of plaintiff in said cause.

2.

That said Court erred in its ninth Finding of Fact, in finding that defendant Ellis had actual notice and knowledge of the fraud and fraudulent intent and all the facts affecting the validity and rendering void the title of his immediate grantor, J. M. Cummings, prior to February 28, 1913.

3.

That said Court erred in its tenth Finding of Fact,

in finding that defendant Ellis had actual notice and knowledge of any claim of lien or right of plaintiff by virtue of his attachments and levy thereof, prior to February 28, 1913.

4.

That said Court erred in making its second Conclusion of Law, that defendant Ellis had actual notice and knowledge of the fraud and fraudulent intent of his immediate grantor, Cummings, and of the prejudice to plaintiff's right thereby.

5.

That said Court erred in making its third Conclusion of Law, that defendant Ellis had actual notice and knowledge of any of plaintiff's lien or rights therein. [88]

6.

That said Court erred in making its fourth Conclusion of Law, that plaintiff has a lien against the real property therein described, and that said liens are superior to defendant's rights therein.

7.

That said Court erred in entering judgment against said defendant Ellis.

8.

That said Court erred in overruling defendant Ellis' motion for a new trial.

9.

That said Court erred in overruling defendant

Ellis' objection to the allowance of attorney's trial fee of Twenty Dollars.

S. O. MORFORD and
J. J. FINNEGAN,
Attorneys for Appellant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 21, 1916. Arthur Lang, Clerk. By A. P. Geraghty, Deputy. [89]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, J. M. CUMMINGS and M. A.
ELLIS,

Defendants.

**Order Allowing Withdrawal of Assignment of
Errors, etc.**

On stipulation of parties made in open court consenting thereto, and for good cause shown, it is hereby ordered that the certain Assignment of Errors, heretofore on the 14th day of April, 1916, filed in the above action, be withdrawn from the files herein, and that the attached Assignment of Errors be filed in lieu thereof, and as of the date of April 14th, 1916.

Done in open court this 21st day of April, 1916.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 21, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 10, page No. 93. [90]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

M. A. ELLIS, ERI THOMPSON and J. M. CUM-
MINGS,

Defendants.

**Order Allowing Appeal and Fixing Amount of Bond
for Costs and Amount of Bond for Supersedeas
on Appeal.**

M. A. Ellis, the defendant in the above-entitled cause, having this day filed in the above-named court his petition for allowance of an appeal on his part from the judgment rendered and entered therein by said Court on the 1st day of December, 1915, with his assignment of errors upon which he will rely on said appeal, appended to said petition, and having presented his said petition and assignment of errors to the undersigned District Judge, presiding in said court, and moved thereon for an order allowing said appeal and fixing the amount of security for the costs of said appeal to be given by him thereon, and also fixing the amount of security for costs and damages

of said appeal to be given by him thereon in order to operate as a supersedeas of said judgment pending the determination, in case the same shall be directed, and the undersigned having considered said petition and being fully advised in the premises;

On motion of Messrs. S. O. Morford and J. J. Finnegan, attorneys for defendant and appellant, it is ordered as follows:

First, that the appeal of said defendant prayed for in his petition be and the same is hereby allowed;

Second, that the amount of the bond to be given by said appellant for the costs of said appeal (but not to operate as a supersedeas) be and it hereby is fixed at the sum of \$500.00, and that upon the filing of a bond for costs on said appeal in said sum conditioned as prescribed by the statute in such case made and provided and approved by the undersigned, said appeal shall become effective; [91]

Third, that the amount of a further bond thereafter to be given by said appellant for the costs and damages of said appeal, in order to operate as a supersedeas of said judgment pending the determination of said appeal, in case he shall be directed to give such supersedeas bond, be and it hereby is fixed at the sum of \$2,000.00, and that upon the filing of such supersedeas bond in said sum, conditioned as prescribed by statute in such case made and provided and approved by the undersigned, within the time prescribed by law for a supersedeas on appeal, further proceedings upon said judgment shall be stayed until the determination of said appeal and the filing of a mandate thereon in this court. Bonds to be

given on or before May 21st, 1916, to be approved by the clerk of the court.

Done in open court this 21st day of April, 1916.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 21, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 10, page No. 90. [92]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON and M. A. ELLIS,

Defendants.

Bill of Exceptions and Transcript of Evidence.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard at Seward, Alaska, on Friday the 12th day of November, 1915, at 10 o'clock A. M., before the Honorable FRED M. BROWN, Judge of said court:

The plaintiff appearing in his own behalf and also by his attorney and counsel, E. E. Ritchie, Esq.;

The defendants appearing by their attorneys and counsel, S. O. Morford, Esq., and J. J. Finnegan, Esq.:

An opening statement was made to the Court by Mr. Reed in his own behalf:

Whereupon the following additional proceedings were had and done, to wit:

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 21, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [93]

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Testimony of J. L. Reed, in His Own Behalf.

J. L. REED, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. J. L. Reed.

Q. Where do you reside? A. Valdez, Alaska.

Q. Are you the plaintiff in this suit?

A. I am.

Q. What is the nature of the claims sued on, which form the basis of this suit?

A. The nature of the claim is a suit for wages for work done by the two claimants upon the Battle Ax claims in the year 1907.

Q. There are two of these claims?

A. There are two of these claims—Karl Karlson and William C. Snook.

Q. Have these claims been reduced to judgment?

A. Yes, and assigned to myself.

Q. One of those judgments was in favor of William C. Snook? A. Yes, sir.

(Testimony of J. L. Reed.)

Q. And the judgment has been assigned to you?

A. Yes, sir.

Q. And the claim of Karl Karlson, was that assigned to you before judgment? A. Yes, sir.

Q. And judgment was recovered?

A. Yes, sir, judgment was recovered.

Q. And you are the present holder and owner of these judgments and whatever rights they confer upon the holder? A. Yes, sir, I am.

Witness excused. [95]

Mr. RITCHIE.—We desire now to offer in evidence the records in cases S-20 and S-21, being the suits in which the judgments were recovered which form the basis of this action. We only want to introduce the judgments, not the entire record.

Mr. FINNEGAN.—We object to the introduction of these judgment records on the ground that we do not find the defendant Ellis in these cases in any manner whatsoever—there is nothing to connect the defendant Ellis with William C. Snook, Eri Thompson or Dave Wallace.

By the COURT.—The objection will be overruled at this time and exception allowed.

Mr. RITCHIE.—In case of appeal we will substitute copies of the parts desired.

The substituted copies of the judgments in above cases, to wit, S-20 and S-21 are marked respectively Plaintiff's Exhibits "A" and "B," are attached hereto and made a part of this record.

Mr. REED.—We will call Andrew Beck. [96]

Testimony of Andrew Beck, for Plaintiff.

ANDREW BECK, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. REED.)

Q. What is your name? A. Andrew Beck.

Q. Where do you reside? A. In Seward.

Q. Were you one of the original claimants in the old suit of Thomas H. Meredith versus Eri Thompson and Dave Wallace? A. I was.

Q. Did you work on Thunder Creek in the year 1907? A. Yes, sir.

Q. Do you know William Snook or Karl Karlson?

A. I do.

Q. Do you know one or both of them?

A. I know both of them.

Q. Was William Snook working on Thunder Creek on the same mining property as you were in 1907? A. Yes, sir.

Q. Was Karl Karlson working with you at that time?

A. No, he worked there, he was working there the winter previous.

Q. What were his duties?

A. He was bringing in supplies.

Q. Hauling in supplies to this particular mining ground? A. Yes, sir.

Q. Did you see him working?

A. No, I did not—I saw him leaving Glacier Creek.

Q. Was he going up to this mining ground, or do

(Testimony of Andrew Beck.)

you know? A. That is what he was hired for.

Q. By whom? [97]

A. By Wallace and Thompson.

Mr. FINNEGAN.—We object to this.

Mr. REED.—The purpose of this is to show by this witness that the two claimants in this case—the Snook and Karlson claims— were contemporaneous with the other claimants, upon whose claims judgment was recovered and transcript of the record filed in the recorder's office and a deed was made, as we claim, by Thompson to Cummings, to defeat all of these creditors, not only the five who brought the original action, but the two who came later and sued separate from the original claimants * * * We must at least show a *prima facie* case as to fraud and our contention is that this evidence will show that these two claims involved in this action were of the same character and nature as the other claims and the natural presumption would be that if this deed were made for a fraudulent purpose as to any one or more of those parties, it would be natural to assume that it was made for the same purpose as to all.

Objection overruled; defendant allowed an exception to the ruling.

Q. Those parties were working on that claim in 1907?

A. Snook was working there in 1907; I don't know if Karlson ever did work on the claims.

Q. He hauled supplies to the claims you say?

A. That is what he started out for when he left Glacier Creek.

Q. Did you hear Eri Thompson instruct him to

(Testimony of Andrew Beck.)

go up to the claims? A. Yes, sir.

Q. Was Eri Thompson at Glacier Creek at that time? A. He was, yes.

Q. He was at Glacier Creek?

A. Yes, sir. [98]

Q. Were you working in the saloon with him?

A. No.

Q. Did you see him there? A. Yes.

Q. Do you know whether those supplies, etc. that Karl Karlson left for Glacier Creek with were taken up to the claims?

A. I suppose they were, I don't know.

Q. Did you hear Eri Thompson say anything about Karl Karlson's work?

A. No, I didn't hear Thompson say anything about it; he was supposed to be in there getting the supplies in, that is all I know.

Q. Who? A. Karlson.

Q. And Snook was actually working with you on the ground in the year 1907? A. Yes, sir.

Q. This is the Battle Ax group of mining claims on Thunder Creek? A. Yes, sir.

Mr. REED.—That's all.

Cross-examination.

(By Mr. FINNEGAN.)

Q. Were you a witness in the case of Meredith versus Thompson and Cummings? A. Yes, sir.

Q. At that time you were a resident of Cordova, were you not? A. Yes, sir.

Q. Have you in your possession now or did you ever receive a telegram from Mr. J. L. Reed asking

(Testimony of Andrew Beek.)

you to report to Valdez or to Seward for the trial of that case? [99]

A. I don't remember—I was notified that the term of court would be held there at such a time; I don't remember whether I got a telegram, or by mail.

Q. Did you either get a telegram or letter from Mr. Reed to come to Valdez for the trial of the case?

A. I suppose I did, yes.

Q. Do you remember now what the contents of that telegram or letter was?

A. No, I couldn't remember.

Q. Didn't that telegram or letter as it may be state that it was safe for you and the other witnesses to come to Valdez for the trial, that Thompson couldn't possibly get there.

A. No, I don't think so.

Q. Didn't you some time later show **this** telegram or letter to other parties? A. No.

Mr. RITCHIE.—We object to any further questions along this line—it is wholly irrelevant.

Mr. FINNEGAN.—Well, that is all.

Witness excused.

Mr. RITCHIE.—We desire for the same purpose to offer in evidence the record in Case #2162 in the Circuit Court of Appeals for the Ninth Circuit, entitled Eri Thompson and J. M. Cummings vs. J. L. Reed. The object is to show the finding by this court, which was afterwards affirmed by the Circuit Court of Appeals, as to the deed from Eri Thompson to J. M. Cummings, dated October 25,

(Testimony of Andrew Beck.)

1909, from which Ellis derives his title to the claim.

Mr. FINNEGAN.—We object to the introduction of the record on appeal [100] for the reason that it is not binding upon the defendant Ellis in any manner whatsoever. He is not a party to the litigation, nor were Karlson or Snook, the present plaintiffs herein, parties to that litigation; nor was the deed that was held by the Circuit Court of Appeals to be invalid declared invalid as to Karlson and Snook, but only as to Meredith and his associates in the prior suit.

Mr. RITCHIE.—The finding was that the deed was absolutely void.

By the COURT.—It may be admitted at this time. The objection will be overruled and defendant allowed an exception.

The record is marked Plaintiff's Exhibit "C," admitted in evidence, attached hereto and made a part hereof.

Mr. RITCHIE.—We now desire to offer from the record in S-9 the mandate from the Circuit Court of Appeals, being Case #2162, in the Circuit Court of Appeals for the Ninth Circuit, showing the return. It is simply the Remittitur.

Mr. FINNEGAN.—We make the same objection.

Objection overruled—Defendant allowed an exception.

The Mandate or return is marked Plaintiff's Exhibit "D"; copy is attached hereto and made a part hereof.

Mr. REED.—We call the attention of the Court

(Testimony of Andrew Beck.)

to the fact that the deputy marshal's return in the two actions 20 and 21 show that the attachment was issued; it shows the return of the attachment and the date of the attachment.

I will call Mr. Behrenburg. [101]

Testimony of H. Behrenburg, for Plaintiff.

H. BEHRENBURG, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. REED.)

Q. What is your name? A. H. Behrenburg.

Q. Where were you in the year 1912?

A. In the Cache Creek country.

Q. Were you specially appointed to serve the attachment in these two cases of Snook and Karlson?

Mr. FINNEGAN.—We object to that; if it is in the record as counsel states, the record speaks for itself.

Mr. REED.—It is preliminary.

By the COURT.—He may answer.

A. Yes, sir.

Q. What did you do in making the attachment?

A. I just went with instructions and put the notice up on the camp.

Q. That was on September 22, 1912 as the returns show?

A. I don't remember the date—it was in September, 1912.

Q. Was Mr. Ellis on the ground at that time?

A. No.

(Testimony of H. Behrenburg.)

Q. Did you post the notice on any conspicuous place as your returns show?

A. Right at the camp, yes.

Q. That is the Battle Ax group of mining claims, is it not?

A. I wouldn't be sure what the name of it is,— I never learned.

Q. Was Mr. Ellis on the ground? A. No.

Q. Was any one on the ground at that time?

A. I don't remember whether they were on the ground or not, or whether they were working on that ground. [102]

Q. You don't know whether any one was working on that ground?

A. There was men on the creek, but I couldn't say whether they were on the ground or not.

Q. Is that the ground that Mr. Ellis worked during the summer of 1912, if you know?

A. That was his camp, yes.

Q. Had he been working there during the summer of 1912? A. Yes.

Q. How many men did he work?

A. I couldn't say—he had a crew; I didn't know the number of men.

Q. Approximately how many?

A. Eight or ten men, something like that, I guess.

Q. Did you see Mr. Ellis there that summer?

A. Yes, I did, just going through there paying a visit.

Q. You went over to the ground, did you, to pay him a visit? A. Yes.

(Testimony of H. Behrenburg.)

Q. That is the same ground you attached in this action? A. Yes.

Q. Is that your signature to both of these certificates of levy of writ of attachment? (Showing witness papers.) A. Yes, sir.

Mr. REED.—We wish to offer these certificates of levy, showing the date they were filed for record, to wit, July 25, 1914. They are admitted in evidence, without objection, marked respectively Plaintiff's Exhibit "E" and Plaintiff's Exhibit "F." Copies of said exhibits are attached hereto and made a part hereof.

Q. After you signed these certificates, did you send them to the recorder? A. Yes, sir. [103]

Q. That same month? That same time?

A. Shortly,—a few days after.

Mr. REED.—That's all.

Mr. FINNEGAN.—I have no cross-examination. Witness excused.

PLAINTIFF RESTS.

Mr. FINNEGAN.—At this time the defendant Ellis moves for a nonsuit.

After argument, the motion for nonsuit was by the Court denied and defendant allowed an exception to the ruling.

AFTERNOON SESSION.

Mr. FINNEGAN.—At this time I wish to move to dismiss the action as far as any claim of the plaintiff derived through Karl Karlson is concerned.

After argument the motion was by the Court de-

(Testimony of H. Behrenburg.)

nied and defendant allowed an exception to the ruling.

Mr. FINNEGAN.—I desire to request that we be allowed to amend our pleadings to conform to the proof. We have alleged in paragraph 5 of our Answer that at the time the final payment was made by Ellis to Cummings that the sum of \$2000, or thereabouts was placed in the hands of Mr. S. O. Morford as trustee to pay all outstanding claims. We did not know, it never was brought home to us until to-day that that sum of money was placed in the hands of Judge Morford a year before, rather in 1912 at the time of the first payment and we desire to amend accordingly.

By the COURT.—Very well. [104]

DEFENSE.

Testimony of M. A. Ellis, in His Own Behalf.

M. A. ELLIS, one of the defendants, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. FINNEGAN.)

Q. What is your name and residence?

A. M. A. Ellis; Seattle, Washington.

Q. You are the same party who is defendant in this action? A. Yes, sir.

Q. Are you acquainted with what is commonly called the Battle Ax Association claim on the Susitna River? A. Yes, sir.

Q. Tell the Court when you first visited the prop-

(Testimony of M. A. Ellis.)

erty and what transpired then?

A. In August, 1911, I visited it, spent two days, I think, and one day there visiting.

Q. Who were in possession of the property at that time? A. Harper Brothers.

Q. State to the Court what proceedings you had then with the Harper boys, if any.

By the COURT.—What month was that?

A. It was in the month of August, 1911.

Q. Previous to that, had you been in the Susitna country,—before that time?

A. No, that was my first trip in there.

Q. What is your general occupation?

A. Mining.

Q. You have followed that how many years?

A. Twenty-five.

Q. In what places? [105]

A. Pierce, Idaho—in the Coeur d'Alene country, Idaho and this part of Alaska.

Q. State what transpired between you and the Harper boys at that time?

A. The Harper boys showed me the gold they were cleaning up. I will state I was there prospecting some other ground, for some other parties, dredging ground, and they visited me, several miles below. They were working the ground under a lay. They showed me their cleanups and wanted me to buy the ground, said it was a good buy. We talked it over and I told them I would buy the ground if I could get it at the right price and I just panned around a little; I took their word mostly for what they cleaned

(Testimony of M. A. Ellis.)

up. I had known them a great many years; they worked for me in Idaho for several years. I came away from there then, the 28th of August, I believe it was—I came from that country and came down to the lower country and came out. During the winter of 1912, they came outside and they had an option to purchase the ground and I got an assignment from them and purchased the ground.

Q. From whom did you purchase the ground?

A. I purchased the ground from the Harper Brothers, that is, they had an option from Mr. Cummings and I purchased the ground from the Harper Brothers, paying them a commission and paying them for the tools and what they had on the ground and made the payments to conform with the option they had.

Q. I will ask you to state what this instrument purports to be? (Handing witness paper.)

A. That is the original option that I purchased on, with the assignment from Harper to me—I said Harper Brothers; it is Al Harper. [106]

Mr. FINNEGAN.—We offer this option in evidence.

It is admitted in evidence, without objection, and marked Defendants' Exhibit #1; copy is attached hereto and made a part hereof.

Q. State what transactions you had under that option.

A. Well, I made the first payment of \$4,000 under the option in February, I believe it was, 1912.

Q. To whom did you make the payment?

(Testimony of M. A. Ellis.)

A. I made the payment to the Harper Brothers; I think they transferred it to Mr. Cummings. I wouldn't be sure just how that was made. I was in Idaho when it was made and I had my attorney in Seattle attend to it. It was wired to Seward here, wired to the Bank of Seward.

Q. Is it not a fact, to refresh your memory, that the money was wired to Harper Brothers here at the bank of Brown & Hawkins?

A. I believe that is the way it was, I wouldn't be sure; I don't remember just exactly how the money was paid, but it was paid at that time.

By the COURT.—At what time?

A. In February, 1912.

Q. Was any part of that sum of \$4,000 retained by any other persons?

A. \$2,500 was retained by the Bank of Seward to pay all debts of record against the ground.

Q. Retained in the Bank of Seward or by the Bank of Seward?

A. Well, it was deposited through Judge Morford, I think, but it was in the Bank of Seward, to pay all debts of record against the ground. I heard about that time about the suit that was pending and the amount of the suit I understood was \$1,500 but we didn't know just what the amount would be, so \$2,500 of that \$4,000 was deposited here in the bank to cover that and was [107] there during the pendency of the option.

Q. When did you make your second payment?

(Testimony of M. A. Ellis.)

A. I made the second payment, I think it was the second of August—it was before I came out; I sent out gold dust; made it at the Bank of Seward.

Q. That was 1912?

A. Yes; I wouldn't be certain whether it was the first of August or first of September, but it was the first of August, I think. However, the contract shows for itself; the payment was made when the contract called for it.

Q. (By the COURT.) What amount was that payment? A. Three thousand dollars.

Q. Now, at this time, in the summer of 1912, did you hear or learn of any other outstanding claims, other than the one you have testified to?

A. I had a letter from Mr. Snook, who was at Hope; I got that during the summer while I was out, I reckon. I had never heard of the debt of Snook or any other debts outside of this suit that was started, but I had a letter from Mr. Snook, telling me he had worked several years before for Mr. Wallace on the ground and asking me about how my payments were to be made; I don't remember just the exact wording, but he told me about having some money coming.

Q. Did you reply to that letter?

A. Yes, I answered him and told him I bought the ground, told him how much I had paid and that I had bought it under a contract to make certain payments at a certain time; also told him as I remember that there was \$2,500 on deposit in the Bank of Seward to cover all debts of record and for him to

(Testimony of M. A. Ellis.)

get his debt on record,—that that was the place to get his money. [108]

Q. When did you make another payment?

A. I made the final payment during the next winter some time, I don't know just when.

Q. At the time of the final payment, did you receive a deed to the property? A. Yes, sir.

Q. Was it at that time that you made the payment? A. Yes, sir.

(By the COURT.)

Q. What was the last payment?

A. Three thousand dollars.

Q. And whom was it to?

A. It was to—I made the payment to Judge Morford—he gave me the deed.

Q. At what time?

A. I think it was in February, 1913—I ain't certain about that date.

(By Mr. FINNEGAN.)

Q. Whom was the second payment made to?

A. The second payment was made to Mr. Cummings, through the Bank of Seward here—I didn't make that myself, personally, I sent out a man to make it for me—I was busy at the diggings.

Q. And the third payment was made to Mr. Cummings through Judge Morford?

A. Yes, the third payment was made to Mr. Cummings through Judge Morford—Judge Morford delivered me the deed.

Q. Was Mr. Cummings present at the time of the final consummation?

(Testimony of M. A. Ellis.)

A. No, sir, I think he was in British Columbia some place, so the Judge told me—there was nobody present excepting the Judge.

Q. At the time of making the final payment, and previous thereto, did you make any examination of the record title of the claim [109] or cause any to be made?

A. I had an abstract—I ordered an abstract as I went into the diggings in the spring to work, in the spring of 1912 and when I came out in the fall, the recorder had the abstract for me, and when I got here, to the town of Seward, I heard there had been some kind of papers filed. I stopped on my way a couple of weeks to look at some mining property. I couldn't find out what it was and I wrote back there and they told me it was a suit started against Wallace and Thompson and had nothing to do with me, but I wrote back during the winter, before I made the final payment, to the recorder and asked him if anything showed on the record to let me know, that I expected to make the final payment and he wrote me that nothing had showed against the ground—just a few days before I made the final payment I had word from him that nothing showed.

Q. Have you those letters at the present time?

A. I have not.

Q. You have the abstract?

A. I have the abstract here with me.

Q. Do you identify that instrument? (Handing witness paper.)

A. That is the abstract.

(Testimony of M. A. Ellis.)

Mr. FINNEGAN.—We offer the abstract in evidence.

It is admitted, without objection, marked Plaintiff Defendant's Exhibit #2; attached hereto and made a part hereof.

The WITNESS.—I came out in September—I left the camp on the third of September of that year.

Q. Do you recognize that instrument? (Handing witness paper.)

A. Yes, sir, that is the deed that I received on the final payment.

Q. This is the original deed?

A. This is the original deed. [110]

Mr. FINNEGAN.—We offer the deed in evidence.

It is admitted, without objection, marked Defendant's Exhibit #3—attached hereto and made a part hereof.

Mr. FINNEGAN.—The deed bears date the 28th day of February, 1913, between J. M. Cummings, party of the first, and M. A. Ellis, party of the second part and was filed for record by J. E. Chapman of the Thunder Creek Mining Company on the 28th day of March, 1913, at 15 minutes past 8 A. M. and recorded in Volume 2, Supplement, of Deeds, page 151 Records of Cook Inlet, Precinct, Alaska and signed, this endorsement of record, signed by Lee Van Slyke, U. S. Commissioner and Ex-Officio Recorder by H. W. Nagley, Deputy.

Q. Who is this Mr. Chapman?

A. Chapman was working for me at the time, for several years previous to that time.

(Testimony of M. A. Ellis.)

Q. Did he record that deed at your request?

A. Yes, sir, I was sending him into the diggings to do my early spring work and sent the deed along by him.

Q. What was the total amount that you paid for the property? A. For the Battle Ax?

Q. Yes. A. Ten thousand dollars.

Q. Was that a fair adequate amount?

A. I consider it so.

Mr. FINNEGAN.—That will be all.

Cross-examination.

(By Mr. REED.)

Q. You are acquainted with this deed—why was this 1912 scratched out and 1913 substituted, at the beginning of the deed—This indenture made the 28th day of February, one thousand nine hundred [111] and twelve and the twelve scratched out and thirteen written in—was the deed made in 1912?

A. I don't have any idea.

Q. You don't know anything about that, why that was done? A. No, I never noticed it before.

Q. Where was this deed executed?

A. I don't know that—I received it in Seattle.

Q. Who sent it to you?

A. Judge Morford delivered it to me in person.

Q. Judge Morford delivered it to you at Seattle?

A. Yes, sir.

Q. What day did he deliver it to you, do you remember?

A. I don't remember the exact date, no, but what-

(Testimony of M. A. Ellis.)

ever date the deed shows, I think, was the date—I had my attorneys there looking after it.

Q. This indenture made this 28th day of February, 1913—with the 12 scratched out—was that the day it was delivered to you? A. Yes, sir.

Q. And that was the date of the execution of the deed?

A. I don't know what you mean exactly by execution—that is the day I received the deed; I don't know when the deed was executed.

Q. That is the day you received it? A. Yes.

Q. That was in 1913?

A. I think Judge Morford had to send to British Columbia to get the deed or something; he was on his way to Yakima and I had arrangements with him—I told him I was ready to take it up and he said he had to go to Yakima to visit some of his people and he would write and get the deed and meet me on a certain day in Seattle and we would clean it up, and that was the arrangement we made, and we done it and he delivered the [112] deed to me; I don't know when the deed was executed or where it was executed.

Q. Doesn't that deed state that J. M. Cummings acknowledged the deed on the 28th day of February, in British Columbia? Now how could that deed be acknowledged on the 28th day of February, 1913, in British Columbia, and on the same day be delivered to you in Seattle? Will you explain this discrepancy? A. I never noticed it.

Q. You don't know how to explain that, do you?

(Testimony of M. A. Ellis.)

A. No, sir; I do not.

Q. The last payment under that contract was supposed to be made in October, October 15, 1912, is that not true?

A. I don't remember just what date.

Q. Do you remember writing to William Snook a letter and telling him the last payment under this contract would be made by you in October 15, 1912?

A. I think I did, whenever the contract called for it—I expected to make the payment as the contract called for.

Q. What was the object of deferring the payment from October 15, 1912 to the 28th day of February, 1913?

A. There was financial reasons for one thing; I was hard up at the time and I had made several payments.

Q. Wasn't the real reason for deferring that payment to find out what the Circuit Court of Appeals said about this deed between Thompson and Cummings?

A. No, sir, it never entered into my mind.

Q. It was not—you state that under oath, that was not the fact? A. Yes, sir.

Q. Do you know what the Circuit Court of Appeals said about that deed?

A. I do now, yes—I read the transcript on appeal.

Q. Before you made the final payment on February 28, 1913—was [113] this in Seattle—was the final payment made in Seattle? A. Yes, sir.

Q. You knew of the pending suit then in the Cir-

(Testimony of M. A. Ellis.)

cuit Court of Appeals, did you not? A. Yes, sir.

Q. And you knew of the decision in the Circuit Court of Appeals? A. I don't think I did.

Q. Wasn't the decision rendered on February 3, 1913—hadn't you heard about that?

A. I don't think I did.

Q. Don't you know you did?

A. I don't know whether I knew it or not—it wouldn't have made any difference to me if I had.

Q. You knew that certain creditors of Thompson had in that suit sought to reduce their claims to a judgment and collect it in that suit, did you not—you knew of that in the Meredith case?

A. Yes, sir.

Q. Did you make any inquiries to ascertain how many men worked for Thompson on Thunder Creek in 1907, at the time these claims were created?

A. Only in a general way; all I heard was just conversation and talk; I never heard of any outside claims until I got the letter from Snook during the summer of 1912.

Q. Until that time you never knew of any other claims except the ones in suit at that time, and in litigation?

A. That is all I heard of; I never heard of this Karlson until this suit was filed, this present suit.

Q. You were in possession under your contract to purchase during the year 1912, were you not, in possession of the Thunder Creek [114] mining claims?

(Testimony of M. A. Ellis.)

A. Yes, sir.

Q. And you worked those claims during the summer of 1912? A. Yes, sir.

Q. What time did you leave there?

A. I think it was the third of September, 1912.

Q. You think it was the third of September, 1912?

A. Yes, sir.

Q. Now, on your way out, you heard something about suits being filed?

A. No, I came to Hope and Sunrise and Glacier Creek—I spent a month back in this country, between here and the diggings, looking the country over and I got into Seward and met one of the men I left working on the claim and he told me there was some kind of a paper filed, posted on the cache there.

Q. You knew then that some kind of a paper had been posted on the cache in 1912? A. Yes, sir.

Q. About what month was that?

A. That was in October.

Q. Did you take any steps to ascertain what that paper was? A. Yes, sir.

Q. What did you find that paper to be?

A. They told me it was a suit started by Snook against Wallace and Thompson.

Q. Who told you that?

A. I don't remember, I think it was the recorder over there wrote me.

Q. The recorder wrote you? A. I think so.

Q. Have you got that letter? [115] A. No.

Q. Why didn't you bring that letter?

(Testimony of M. A. Ellis.)

A. I don't keep my letters—I don't have any files of those letters.

Q. The recorder wrote you and told you a suit had been filed—what was the wording of that letter?

A. I don't remember the exact wording.

Q. Don't you know approximately what the contents of that letter was? A. Certainly.

Q. State to the Court what it was.

A. The gist of the letter was that there was a suit started for wages against Thompson and Wallace and the letter also informed me that it had nothing to do with me.

Q. Did he say anything about an attachment being levied on the ground? A. No, sir.

Q. You are under oath and you say you knew nothing about an attachment being levied on the ground? A. No, sir.

Q. Absolutely nothing?

A. Absolutely nothing. I came to Judge Morford and asked him if he knew about it and had him call up the office at Valdez, while I was here, the two or three days I was waiting for the boat and he couldn't find out anything for me, what the papers were at all and I didn't know until I heard from up there that it was a suit started against Thompson and Wallace.

Q. That was in October, 1912?

A. Yes, I was on my way home to Seattle.

Q. You say in October, 1912, here at Seward, that somebody informed you there had been a paper filed upon the ground, is [116] that true?

(Testimony of M. A. Ellis.)

A. Yes, sir.

Q. On the Thunder Creek property?

A. Yes, sir.

Q. A paper served on the ground?

A. Yes, sir.

Q. And he didn't know what kind of a paper it was?

A. I was told that some kind of a paper was tacked up on a post out there.

Q. What was told you by this party, what were the words he used about this paper?

A. He said he didn't know what it was, but it was something about Thompson and Wallace, who were interested in the ground.

Q. What did he say about it being tacked up on the ground?

A. He said that Henry Behrenburg came over there and stuck it up on a post there, close to the camp, a post at the cache.

Q. With that knowledge in your possession did you go to the ground yourself or send anyone to the ground to ascertain what that paper was, what was posted up by Behrenburg?

A. No, I wrote back to Susitna Station to Nagley, who was acting recorder at that time—I wouldn't be sure whether it was Nagley or Van Slyke, one or the other of them, and asked them about it.

Q. And you relied upon what they told you?

A. I did, also relied upon what Judge Morford told me; I had him look it up here, went to him about it and asked him what he knew about it and he

(Testimony of M. A. Ellis.)

called up and tried to find out something about it.

Q. Did anybody tell you, after you received this information, or did anybody on your behalf after you had received this information, report to you, what the contents of that paper was that [117] was posted up? A. No, sir.

Q. You relied upon the information of others who had not seen the paper, is that correct?

A. There was a man working on the ground at the time the paper was posted there and I relied upon the information he had.

Q. What did he say?

A. He told me it was some kind of a paper about Thompson and Wallace, he didn't know just what it was.

Q. Did you ask him as to the particulars, and contents of the paper?

A. I did, but he didn't know.

Q. And you didn't pursue the inquiry further than that?

A. I did; as I say I went to Judge Morford and wrote up there, either to Nagley or Van Slyke, I don't remember which.

Q. This man that you wrote to, who stated it was some kind of a paper in relation to a suit between Wallace and Thompson, between the assignors in this action and Wallace and Thompson,—you have stated what he told you—was the only person that you relied upon that had actually seen the paper?

A. I relied upon the abstract that I got afterwards and the letter from the commissioner told me

(Testimony of M. A. Ellis.)

that there was nothing against the ground.

Q. You haven't got that letter, have you?

A. No.

Q. That letter was not certified to in the form of an abstract? A. I don't think so.

Q. This abstract was made September 7, 1912, which was prior to September 22, 1912, when the attachment was served, is that correct?

A. Yes, sir. [118]

Q. So you had no abstract subsequent to that time? A. No, sir.

Q. After you had received this notice and the knowledge of this paper being tacked up on a post on this ground, the only person that saw that paper that told you as to what its contents was, was this man that wrote you?

A. Yes, I had a letter from up there and Judge Morford here—

Q. I am asking about the people that had seen this paper—that was the only man that told you what the contents of that paper was?

A. That was the only man I remember of, yes.

Q. And you didn't pursue any further inquiry through any source that had direct knowledge of the contents of that paper?

A. No, I went right on outside of the boat—left it with Judge Morford here to look after.

Q. Did you, after receiving that notice of this suit, make any effort to ascertain what the suit was about from the files of the clerk's office of the District Court?

(Testimony of M. A. Ellis.)

A. No, I left that to Judge Morford.

Q. You never made that investigation yourself?

A. No.

Q. You never went to the clerk's office after that time to find out whether an attachment had been sued out in these suits?

A. I never went to the clerk's office in my life.

Q. Now, you say that you wrote Mr. Snook and told him that there was \$2500 that had been left in the bank to pay creditors, is that true?

A. I wrote to him; I don't know that I stated the exact amount—I don't keep copies of my letters; I told him that I was tied up to perform a certain contract, make certain payments at a [119] certain time, but there was some money in the Seward bank.

Q. And in that letter, did you not advise Mr. Snook to bring suit on his account?

A. I did; I told him to get it in the record, that was the place to get his money.

Q. But you never found out whether it was in the record afterwards, did you? Is that your letter? (Handing witness paper.) Is that the letter you received from Mr. Snook?

A. No, this is the letter I wrote to him.

Q. Look at the other side and see if it is not the letter he wrote to you and the reverse side, the letter you wrote to him, in response thereto.

A. Yes, that is both letters.

Mr. REED.—We offer that letter in evidence.

It is admitted, without objection, marked Plain-

(Testimony of M. A. Ellis.)

tiff's Exhibit "G"; is attached hereto and made a part hereof.

Q. Following the advice that you gave to Mr. Snook in that letter for him to bring suit on his claim, did you go to the clerk's office to ascertain whether he had conformed to that advice?

A. No, sir.

Q. You did not? A. No, sir.

Q. Now, going back to the question as to who the creditors of Thompson were in the year 1907 on the Battle Ax group, you knew that certain men that had worked on those claims that summer had brought suit for their claims?

A. Yes, I heard of it.

Q. And they had secured judgment and sought in another action to set aside the conveyance of Thompson to Cummings as being void for fraud?

[120]

A. I didn't know about their bringing another suit to set aside—I knew there was some claims and some kind of a suit but I didn't know the particulars of it.

Q. When you made this last or final payment in Seattle to Judge Morford, did you make any inquiries as to what that suit was for or what its object was?

A. No, I made inquiries from Judge Morford about the suit or if there was anything showed on the records—I had left it with him to look into this matter when I was here in the fall.

Q. You didn't know what the purpose of that suit

(Testimony of M. A. Ellis.)

that was pending in the Circuit Court of Appeals at that time was?

A. No, I supposed it was to collect wages.

Q. You didn't know it was to set aside this deed from Thompson to Cummings for fraud? A. No.

Q. You never heard there was any fraud in the deed from Thompson to Cummings?

A. I never heard anything of that kind.

Q. Did you know the deed from Thompson to Cummings was being attacked by suit?

A. I did not.

(Mr. Reed reads exhibit "G" to the Court.)

Q. Did you go to Hope that fall? A. Yes, sir.

Q. Did you look up Mr. Snook?

A. Yes, I was at his house—he was off doing assessment work.

Q. You didn't get to see him then?

A. No, I didn't get to see him.

Q. You swore to this answer to the amended complaint, did you not? A. Yes, sir. [121]

Q. Did you read it?

A. I hurriedly read it; I was only here about an hour in the morning and had to go up and see Judge Morford and drag him out of bed.

Q. Was it read to you? A. No.

Q. Did you know the contents of it?

A. In a general way, yes.

Q. You swore to it, did you not—that the facts stated in that answer were true, did you not?

A. To the best of my knowledge and belief.

(Testimony of M. A. Ellis.)

Q. Is this true, to the best of your knowledge and belief—

That this defendant had no knowledge or information that there existed any other claims or demands of any kind or nature against Eri Thompson and Dave Wallace or Eri Thompson and J. M. Cummings, other than the suit of Thomas H. Meredith vs. Thompson and Cummings.

Is that part of your answer true? A. No.

Q. That answer is false? A. Part of it.

Q. You swore to the Answer but you didn't know what the contents were?

By the COURT.—He answered he swore to it.

Q. Is this part of your answer correct:

This defendant denies any knowledge or information of any claim or demand of any person or persons, other than the suit of said Meredith vs. Thompson and Cummings, either before or at the time of his final payment to said J. M. Cummings for said Battle Ax group of mining claims, on or about the 28th day of February, 1913. He denies that he had any knowledge or information of any suit or attachment of Karl Karlson or William C. Snooks or any other person or persons against J. M. Cummings, or Dave Wallace, or Eri Thompson, at or prior to the 28th day of February, 1913, the date when this defendant made final payment to said J. M. Cummings and received from him a deed to said Battle Ax group of mining claims.

(Testimony of M. A. Ellis.)

Is that true or false? [122]

A. It is partly true and partly false—I am telling you here that I did know before.

Q. You did know? A. Yes.

Q. That is partly false then, as to the fact that you did not know?

A. It is a mistake. I got here in the early morning on my way to Seattle, at four o'clock in the morning, I think it was, and had to go and wake Judge Morford out of bed and we came down and the boat was whistling when I saw the complaint. I never had a chance to read it or digest it or study it, I just glanced at it and supposed it was all right and signed it—in fact, I never had a chance to talk with the Judge about the case.

Q. Who was that party that told you about the paper being posted up on the ground?

A. Mr. Arthur Meloche of Seward.

Q. He is here, is he?

A. I think he is in the courtroom probably,—yes, he is.

Q. Did you have knowledge of any other fact or circumstance relative to these subsequent suits of Karlson and Snook other than you have stated?

A. I don't just understand what you mean.

Q. You stated certain knowledge that you possessed regarding these suits, the posting up of the paper and that suit had been started in October, 1912—did anyone else tell you about the suits?

A. Not that I remember of.

Q. You wrote up to some one on the ground—

(Testimony of M. A. Ellis.)

when did you write that letter?

A. Not on the ground; I wrote to somebody at the station—there was nobody up at the ground that time of the year. [123]

Q. What time of the year was it you wrote this letter?

A. It was in the fall, after I got to Seattle.

Q. Was that one of the men that was working for you during the summer of 1812? A. Yes, sir.

Q. What was his name? A. That I wrote to?

Q. Yes.

A. No, that was either the recorder or the acting recorder—I don't remember whether it was Judge Van Slyke or Mr. Nagley.

Q. Didn't you state in your direct examination that you wrote up to somebody that had seen this paper on the ground to ascertain what its contents were? A. No, sir.

Q. Didn't you state that?

A. I don't think so, if I did I was mistaken. I seen Meloche who had seen the paper—I saw him here in Seward.

Q. Was he the man you saw after you came out from the diggings? A. Yes, sir.

Q. Didn't you state in your direct examination that you had written to somebody up on the ground that had seen the paper, besides Arthur Meloche? A. No, sir; if I did I stated wrong.

Q. So Arthur Meloche was the only person who spoke to you about the paper? A. Yes, sir.

Q. And that was in a conversation which you had

(Testimony of M. A. Ellis.)

with him here in Seward? A. Yes, sir.

Q. That was during October, 1912? [124]

A. Some time during October, 1912—I don't just remember the date.

Q. What did he tell you as to the contents of that paper?

A. Well, he didn't know much about it, he couldn't tell me much about it—he didn't know just what it was.

Q. Then outside of Arthur Meloche you never pursued any further inquiry to ascertain by direct information as to the contents of that paper?

A. Only through Judge Morford, and I went down and told my Seattle attorneys about it and turned it over to them.

Q. Did you seek information from any other one except Arthur Meloche, who had seen that paper, as to its contents?

A. No, no one else that had seen the paper—I asked several people about it; the Harper Brothers were in town.

Q. They hadn't seen the paper? A. No.

Q. So Meloche was the only person who had seen the paper that you had direct knowledge of?

A. The only one I remember of.

Q. Can you think of anyone else? A. No.

Q. Would you know if you had any conversation with anyone else?

A. I don't know whether I would or not—I don't remember seeing anybody from that country after I left.

(Testimony of M. A. Ellis.)

Q. After receiving that knowledge, you didn't ask anyone to go to the clerk's office to ascertain about the suit and whether there had been an attachment?

A. I asked Judge Morford to investigate it.

Q. Did he say he had gone to the clerk's office and investigated it?

A. I don't remember what he did say, only there was nothing to it, [125] he couldn't find out anything, at the time I was here and afterwards he told me there was nothing showed on the records.

Q. What records did he refer to?

A. I don't know.

Q. Did he tell you that he had examined the files in the clerk's office?

A. No, he did not tell me that.

Q. You knew where suits were filed in this district?

A. I suppose they would be filed in Valdez.

Q. And with this knowledge you had, you could have sent someone to the clerk's office to find out about this, couldn't you?

A. I could; I depended on Judge Morford to do that—I was paying him for it.

Q. You don't know whether he did it or not?

A. He told me he did.

Q. Did he tell you he had been to the clerk's office?

A. No, he didn't tell me that—I don't remember if he did.

Witness excused. [126]

Testimony of S. O. Morford, for Defendant.

S. O. MORFORD, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FINNEGAN.)

Q. What is your name? A. S. O. Morford.

Q. Where do you reside? A. Seward.

Q. You have been acquainted with the legal actions that have been pending in this court and the Circuit Court of Appeals in which the property here involved was in litigation, for some number of years?

A. I have.

Q. And are thoroughly familiar with all the procedure that has been had and taken? A. Yes, sir.

Q. Have you acted in this matter as one of the attorneys of record for Mr. Ellis?

A. In this case?

Q. Yes. A. Yes.

Q. When did you first meet Mr. Ellis, if you remember?

A. Well, I am not able to state the exact date—I think it was in connection with the Harper Brothers and this deal between the Harpers and Ellis—I think that is the first acquaintance I had with him; it is the first I now remember.

Q. At that time, there has been testimony here of the transfer of the lease and option from the Harper boys to Ellis and also agreements between Ellis and Cummings—did you act for Mr. Cummings in these matters? A. I did. [127]

(Testimony of S. O. Morford.)

Q. As his attorney? A. Yes, sir.

Q. And did you act as Cummings' attorney at the final consummation of the deal in Seattle on February 28, 1913? A. I did.

Q. Was Ellis present at that time?

A. Ellis and Mr. Sauter was there; he was representing Mr. Ellis; he is an attorney in Seattle and I was representing Cummings.

Q. Was Cummings present?

A. Cummings was not present when the deal was closed, I think he was not present; I don't remember very distinctly; I was in a hurry to get to Yakima at that time; my daughter was sick over there and I left hurriedly and the deed had to come back from British Columbia, I think, and I think after the first conversation, an adjustment of the matter had been talked over by Sauter and Ellis; I went to Yakima, was gone a number of days and came back and in the meantime, the deed had come and I went up and consummated the deal and final settlement with Sauter and Ellis.

Q. At that time did you deliver Cummings' deed to Ellis? A. I did.

Q. What did you receive therefor?

A. Received the balance of the payment, either in a check or draft from Ellis,—I am not now certain.

Q. What did you do with that money?

A. That money was sent to Cummings.

Q. In British Columbia?

A. In British Columbia.

(Testimony of S. O. Morford.)

Q. The year previous had any money been placed with you as trustee in this transaction? [128]

A. After the time when the suit of Meredith versus Thompson and Wallace and the suit between Meredith or Reed, as assignee, against Thompson and Cummings were appealed, \$2,500 by agreement was placed in my hands to meet the possible contingency of the suit being affirmed and Cummings would have to pay the judgment. The money remained in my hands until after the judgment had been rendered in the Court of Appeals and I think if I am not mistaken that I gave Mr. Ritchie a check or draft for the money and settled the suit.

Q. Do you remember approximately what date it was that this money was placed in your hands?

A. It was somewhere in—if you will tell me the time when the case was appealed—it was at or about the time that the case was appealed from the District Court to the Court of Appeals.

Q. It was in the spring of 1912?

A. About that time, probably April.

Q. How long did that money remain in your hands?

A. Until after the final judgment and Remittitur came down from the Court of Appeals; then I paid out of that money—\$2,175 if I remember right or thereabouts of that money was paid to Mr. Ritchie in satisfaction of that judgment and costs.

Q. So the money remained in your hands as trustee for a year practically, or more? A. Yes, sir.

Q. And at the time of paying the judgment and

(Testimony of S. O. Morford.)

the costs there was still a balance in your hands of \$300 or more? A. Yes, sir.

Q. At the time of the consummation of the final arrangements in Seattle and previous thereto, had you at the request of Mr. Ellis investigated the title to the claims? [129]

A. Yes, I had made an effort to.

Q. What were your discoveries?

A. After the time when there was a rumor that a paper had been filed on the claim, probably the time when Ellis came out, I wrote to Susitna Station enquiring if any attachment had been recorded or entered up there against any of that property, that is as I remember it now, and received a reply there was none. After I came back, I think, from Seattle, in 1913, I had made some enquiries and got copies I think of the suit—there had been a suit filed by a man named Snook and I think the clerk, if my memory serves me right, wrote me that there were two suits filed. Then I got a copy of both the complaints in those actions and that was a suit against Thompson and Wallace and as I remember it, it was after I came back from Seattle, in 1913, after the payment.

Q. State if you know whether this deal on the part of Cummings was entered into on his part with the idea of delaying or defrauding any creditors of his?

A. Absolutely not; Mr. Cummings had been assured by myself that we were entitled to a judgment in our favor.

Mr. REED.—We object to that as self-serving.

(Testimony of S. O. Morford.)

By the COURT.—It may stand—objection overruled. Plaintiff allowed an exception.

Q. During the time that you were dealing with Mr. Ellis in the sale of this property, you acted entirely, did you, for Mr. Cummings? A. Entirely.

Q. You were conversant with every move in the transaction from its inception to its finish?

A. I think so.

Q. Did you at any time during the progress of the transactions attempt [130] to conceal or did you conceal any imperfection or defect from Mr. Ellis?

A. Not with knowledge, I am sure.

Mr. RITCHIE.—We object to that as incompetent, irrelevant and immaterial and move to strike the answer.

Objection overruled and motion denied. Defendant allowed an exception.

Mr. FINNEGAN.—That is all.

Cross-examination.

(By Mr. RITCHIE.)

Q. This first contract here between Cummings and the Harper Brothers in December, 1911, that was drawn by you in your office here in Seward?

A. I don't know.

Q. The witnesses to the signature of Cummings are S. O. Morford and Curtis R. Morford.

A. Well, it is possible it was drawn in the office.

Q. When did you first hear of the claims of Snook and Karlson?

A. I never heard of the Karlson case until after

(Testimony of S. O. Morford.)

I came back from Seattle in 1912, after the final payment and settlement, as I stated in my direct examination. If my memory serves me, it was a notice I received from the clerk's office, in enquiring about the suit, that there was two suits. That is my memory of it now. The Snook matter I was familiar with at an earlier date. Snook was here in Seward about the time that Mr. Reed took charge of the Meredith cases, somewhere along there and Mr. Snook I interviewed at Mr. Fitzpatrick's saloon here, had a talk with him about the claims of these laborers that had joined with Mr. Meredith. Mr. Snook informed me that he never worked for Mr. Thompson and he knew they had dissolved partnership [131] and had refused to put in any claim with Meredith, and I asked him if he would so swear if I put him on the stand but we were prevented in the first trial from getting our witnesses and consequently he was never subpoenaed to answer.

Q. When was this?

A. That was before the trial of Meredith against Wallace and Thompson—it was prior to that time, we anticipated using him as a witness.

Q. When did you next hear of the Snook claim?

A. When this enquiry was made here, about the fall of 1912, or early in the spring, but nothing definite had I found out until after my return.

Q. Mr. Ellis has testified here that he received the letter introduced in evidence and made answer on the same sheets? A. Yes.

Q. And it is admitted that the contents of both of

(Testimony of S. O. Morford.)

those letters are correct—the letters were so transmitted, and he afterwards went to Hope, the same season if I remember his testimony, to see Mr. Snook, but was unable to see him—you heard that testimony? A. Yes.

Q. Did Mr. Ellis talk to you any in the fall of 1912 about the Snook claim or the Karlson claim?

A. I think there was a conversation in reference to a rumor of a suit or claim being filed on the property and I wrote to the recorder in reference to whether any attachment had been filed or suit filed in that court, or attachment filed in that court in the commissioner's office in Susitna.

Q. The question was, did you and Mr. Ellis talk about these Snook and Karlson claims when he came out in the fall of 1912? [132]

A. I think it was mentioned, yes.

Q. Did he tell you that Arthur Meloche had told him about the notice being posted on the cache house?

A. It is hard to remember exactly but I almost feel as if Meloche and Ellis were both at my office.

Q. And you talked it over? A. Yes, sir.

Q. It was then you wrote to Lee Van Slyke or whoever happened to be recorder at Susitna?

A. Yes, after that.

Q. Mr. Ellis has testified that it was about the first of October he was out here?

A. I wouldn't be certain without getting the records as to the dates.

Q. It would be about that time? A. Yes, sir.

(Testimony of S. O. Morford.)

Q. Mr. Ellis stated that he left the creek up there on the third of September and came out past Hope and was here about the first of October for a few days—so your conversations with him must have been about that time?

A. It was fall I think when Ellis was here.

Q. And you wrote to Van Slyke about that time or very soon afterwards? A. Probably.

Q. To get what information you could?

A. Yes.

Q. When did you receive his answer?

A. I don't remember.

Q. You went out the next winter?

A. I went out that winter probably, in January maybe.

Q. And how long did you remain out? [133]

A. I think I came back here somewhere about the fore part of March.

Q. Do you remember who wrote this deed from Cummings to Ellis, dated the 28th of February, 1913?

A. It was written by Mr. Sauter probably in the office, I don't know.

Q. You didn't go to British Columbia?

A. No.

Q. I see that Eri Thompson is one witness and S. O. Morford another witness to the signature of Cummings—your deed was drawn up and you signed it in Seattle as a witness? A. On its return.

Q. From your knowledge of Cummings' signature? A. Yes, sir.

(Testimony of S. O. Morford.)

Q. You didn't meet Cummings in Seattle?

A. I don't remember that I did.

Q. At the time the money was paid he was in British Columbia, at the same place Thompson was?

A. I don't know where either one was.

Q. Thompson appears to have signed as a witness—did Thompson have anything to do with this deal?

A. Not to my knowledge—the money went direct to Cummings.

Q. Now this deed seems to have been dated the 28th of February and acknowledged the same day before some notary in British Columbia. Do you know what date it was returned to you in Seattle?

A. I couldn't tell exactly without going and hunting up my records, when I was in Seattle; it was during the time I was outside and after I had been over in the Yakima country.

Q. What time did you come back in the spring of 1913?

A. I think some time early in March I got here.

Q. Did you bring this deed with you when you came? [134]

A. No, I never saw it until it was returned to me; it went to Mr. Ellis from Mr. Sauter's office in Seattle.

Q. You didn't have it filed? A. No.

Q. The final payment was made by Mr. Ellis to Cummings about March, 1913?

A. It was made at the time the deed was delivered—it was along about the time of the date of the deed.

(Testimony of S. O. Morford.)

Q. At that time had you received an answer from Van Slyke to your letter enquiring about this case?

A. I think it is barely possible I did but more than probable I got the letter after my return—I am not certain.

Q. Before you went out, that fall of 1912, you wrote to the clerk of the court, I believe you said, in Valdez—is that correct?

A. Now as to the exact date, I couldn't say.

Q. It was before you went out you wrote him?

A. I wouldn't say as to that, I think I did; my remembrance of it is that I first wrote to Susitna and found that there was no attachment or suit there; then after receipt of that, it may have been after my return from Seattle, I wrote to the clerk of the court and in the final outcome of it, I was able to get two copies from the clerk of the court of the suits that were pending.

Q. You didn't know then, as far as you remember now, when you went outside in the fall of 1912, that these suits were actually filed?

A. If my memory serves me right, I didn't know that; the record of those letters would show; it is impossible for me to remember these dates and keep them accurately before me.

Q. Here is what is apparently a copy of a letter, very likely copy of a letter you wrote and then a letter from Mr. Van [135] Slyke—do you recognize those letters?

A. This is a copy of the letter I wrote Mr. Van Slyke in August, August 19, 1913, and this is the

(Testimony of S. O. Morford.)

reply that I received from Mr. Van Slyke in September, 1913.

Mr. RITCHIE.—We offer these two letters in evidence and ask that they be marked Plaintiff's Exhibit "H."

They are admitted without objection, marked Plaintiff's Exhibit "H," copies attached hereto and made a part hereof.

Q. Was it about the time you wrote that letter that you learned about these cases?

A. That was the rumor and that was the effort I was making to find out about the suits.

Q. You know now that those cases were filed in August, 1912? A. The record so shows, I believe.

Q. Mr. Ellis testified here a while ago that he found out everything he could after Arthur Meloche told him about this matter, but he had to hurry away and left it in your hands—you didn't make any special effort then to find out anything further about it that fall?

A. I think I wrote to Susitna Station that fall.

Q. Did you write immediately to the clerk of the court at Valdez?

A. I don't think I wrote the clerk of the court at Valdez at that time,—I don't know as I did.

Q. You are a pretty good lawyer—you knew that an attachment levied on real estate couldn't be any place except in the District Court?

A. I knew an attachment was required to be filed in the Commissioner's office, if an attachment was brought, and I looked there for the attachment.

(Testimony of S. O. Morford.)

Q. But you knew also, as a lawyer, that if an attachment was levied [136] on real estate, it must necessarily be in a case in the District Court?

A. Yes.

Q. But you didn't write at that time to the clerk of the court to ascertain if those suits were filed there?

A. I don't believe so, I don't remember that I did; the suits were not against Mr. Cummings.

Q. You knew that an attachment would be good against anyone having actual knowledge?

A. Not necessarily—the suit was not against the parties who had the record title.

Q. All you did then in pursuance of Mr. Ellis's instructions in the fall of 1912 was to write to Van Slyke to see what his record showed?

A. My recollection is that I first wrote to the Commissioner at Susitna to enquire if there was any suit pending there or any attachment having been filed and I received a reply that no attachment had been filed against any of the property and later, following that, whether before or after I came back, I made enquiry of the District Court and then as I remember it was the first time I learned that there were two cases; there had been a rumor of one, but I learned from my letters from the clerk of the court that there were two cases.

Q. How many times did you see Mr. Ellis in Seattle in the early part of 1913?

A. I think I met him at Mr. Sauter's office when

(Testimony of S. O. Morford.)

I went down; shortly after I went down and if I am not mistaken just one afternoon when the papers came back and I went up to Mr. Sauter's office to close it.

Q. Did you discuss these possible or rumored suits with him in [137] either of these conversations?

A. I told Mr. Ellis that there was nothing against the claim except the possibility of a judgment in the Court of Appeals; that judgment was actually rendered against Mr. Cummings before the date we passed the deed, but I didn't learn of it until I returned here in March and a notice of the case having been confirmed in the Court of Appeals was awaiting me on my return.

Q. And you didn't tell him about any suits in the District Court because you knew nothing of them at that time?

A. I don't think I had any knowledge of any; I told him I knew of nothing against the claims only this one suit—nothing that could be a lien or claim against it.

Mr. RITCHIE.—That will be all.

Redirect.

(By Mr. FINNEGAN.)

Q. I will ask you if you can identify these instruments? (Handing witness papers.)

A. Yes, sir.

Q. What do they purport to be?

A. One is a copy of the letter I wrote to the clerk of the court October 11, 1912 in answer to one re-

(Testimony of S. O. Morford.)

ceived from the clerk of the court dated October 8, 1912.

Mr. FINNEGAN.—We offer these letters in evidence.

They are admitted without objection, marked Defendant's Exhibit 4 and read to the Court by Mr. Finnegan. Copies are attached hereto and made a part hereof.

Q. Do you remember sending such a letter and receiving this answer?

A. My memory is recalled to it by seeing the copy.
[138]

Q. Did you ever receive any further answer from the clerk of the court as to any attachment that was levied?

A. Well, I don't remember; if my memory serves me right, I looked at the records in Valdez after I came back from Seattle and I had made the enquiry from Susitna as to any levy of attachment or record of attachment there and none existed. I pursued the matter from time to time to find out and I think talked with Mr. Ritchie about the publication of summons and I thought there would be no attempt to push any suit to judgment against Wallace and Thompson. Then I afterwards saw the publication of the notice and later found they had taken a default judgment in those cases.

Q. You were not interested in that litigation in any way? A. Not in the least.

Q. You were not acting for Mr. Thompson or Mr. Wallace, the defendants? A. Not at all.

(Testimony of S. O. Morford.)

(By Mr. RITCHIE.)

Q. It appears then since your memory has been refreshed, that you did have the information shown by those letters, that fall? A. Yes, sir.

Q. Your letter marked exhibit 4 reads—As soon as you receive return of attachment, please send me a copy of the writ and return, as I am informed an attachment has been placed upon the property at Susitna—you mean by that of course the Battle Ax claim? A. It was in reference to that.

Q. So you did at that time have knowledge of the attempt at attachment at least? [139]

A. The rumor of an attachment, that was all, and I was trying to find out whether any attachment or papers had been filed.

Q. Then the clerk writes to you that there has been no return of the writ of attachment, which necessarily shows that one had been issued?

A. Yes, probably.

Q. You spoke of the publication of notice—wasn't that about the fall of 1912 that this publication of summons was made?

A. I think not, I think there was a publication of summons later than that.

Q. You think there was none published at that time?

A. No, I didn't see it until later any way—it might have been; I picked it up in an older paper; I don't know of any publication of summons and I feel confident there was no publication of summons came to me until later, after my return here.

(Testimony of S. O. Morford.)

Q. You made some statement regarding a conversation with me—I will ask you if you did not have a conversation with me at the same time, very likely when you came back, or the next spring, 1913 about the pendency of this suit?

A. I have a faint recollection of talking with you about it.

Q. As you came through Valdez probably?

A. Possibly.

Q. Now I will ask you if the conversation was not something like this—you asked me what we were doing about those suits and what we expected to get out of them and then you said—I may be wrong about this—I will ask you if at that time you did not state that we had lost out on it because the notices of attachment had not been filed in Van Slyke's office at Susitna. You made that statement to me at that time or possibly later, did you not? [140]

A. It may have been at some time when we discussed it later, but I don't remember all of that conversation.

Q. Don't you think it was about that time?

A. I think it was some time after that.

Q. At that time you had ascertained, however, that the writs had not been filed by Van Slyke but had been sent to the clerk of the court instead? I mean the notice of the writ?

A. The notice of the writ of attachment I got after I came back, I think, from below. The letter was in October—whether I received any notices of the return until after I came back in the spring or

(Testimony of S. O. Morford.)

not, I couldn't say. They were not on file apparently at the time the letters were written and I had conferred at a later date again and found there was no levy of attachment or notice of attachment filed in the commissioner's office in Susitna, even a later date than the time when the first inquiry was made.

Q. Now you and Mr. Ellis both knew from the first of October, 1912, about that date, that there was a suit pending and an attempted attachment on the Battle Ax claim and you depended upon what you thought was a fatal, technical omission in the failure of Van Slyke to record this notice?

A. No, the suit, if my memory serves me right, the rumored suit, was a suit against Wallace and Thompson, Snook against Wallace and Thompson. The claim had been apparently filed or a suit or some proceedings instituted.

Q. So there was a rumor that a notice had been filed on the claim in the fall of 1912.

A. Then is when I followed it with my enquiry—after that I got the returns by letters as you have seen them here. I had no idea that any suit would be brought by Snook against Thompson [141] and Wallace and knew nothing of the other men at all until later, and relied upon the statement made by Snook to me, in the early history of it.

Q. But the correspondence between yourself and the clerk of the court in October, 1912, shows that you had knowledge that a written attachment had been issued and you believed an attempt had been

(Testimony of S. O. Morford.)

made to levy it on this property?

A. I thought there had been an attachment issued and that there would probably be a return of it.

Q. So you had that much notice of the attempt to attach at that time?

A. Yes, as against Thompson and Wallace, had an intimation of it.

Q. Yes, against them, but on the Battle Ax claim?

A. I presume I thought it would apply to that, if anything.

Witness excused.

TESTIMONY CLOSED. [142]

I do hereby certify that I am the official stenographer of the court for the Third Judicial Division of Alaska; that as such I reported the proceedings had in the above-entitled cause, to wit, J. L. Reed vs. Eri Thompson and M. A. Ellis; that the above and foregoing is a full, true and correct transcript of the evidence introduced at said trial.

Dated at Valdez, Alaska, February 28, 1916.

L. HAMBURGER. [143]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Order Settling, etc., Bill of Exceptions.**CERTIFICATE OF TRIAL JUDGE.**

The undersigned, the Judge of the above-named court who presided at the trial of the above-entitled cause, hereby certifies, in pursuance of the foregoing stipulation of the parties, and in accordance with the facts, that the annexed and foregoing bill of exceptions and transcript of evidence is a true and complete transcript of all the evidence adduced or offered at said trial and of all proceedings thereat.

Witness the hand of said Judge and the seal of said court, at Valdez, Alaska, this 21 day of April, 1916.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 21, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[144]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Motion and Objections to the Bill of Exceptions.

The plaintiff, J. L. Reed, interposes objections to the Bill of Exceptions contained in the transcript of record on appeal herein, upon the following grounds:

FIRST. That said defendant M. A. Ellis failed to file a statement of his exceptions taken during the trial to the ruling of the Court and to its findings of fact, prepared and settled as in an action, with the clerk of this court within ten days from the date of the entering of the decree in this cause, to wit, on the first day of December, 1915, and that no further time therefor was allowed by the Court.

SECOND. That said defendant M. A. Ellis failed to file a motion for a new trial herein within three days after the findings and decree herein, to wit, within three days after the first day of December, 1915, and that no further time therefor was allowed by the Court.

That for the reasons above set forth said objections are made to the incorporation of any or all the evidence adduced at the trial of this cause into the Bill of Exceptions and upon which said defendant M. A. Ellis' assignment of errors is predicated, and the plaintiff herein now moves the Court for an order to strike the same from the Bill of Exceptions and Transcript of the Record.

J. L. REED and
E. E. RITCHIE,
Attorneys for Plaintiff.

Service accepted April 21, 1916.

J. J. FINNEGAN,

Attorney for Defendant, Ellis.

Filed in the District Court, Territory of Alaska,
Third Division, Apr. 21, 1916. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy. [145]

*In the District Court for the District of Alaska,
Third Division.*

S-49.

J. L. REED,

Plaintiff,

vs.

M. A. ELLIS, ERI THOMPSON and J. M. CUM-
MINGS,

Defendants.

**Minute Order Overruling Objections to Filing Bill
of Exceptions.**

Now, on this day, the hearing on the objections to the filing of the Bill of Exceptions in this cause having come on to be heard, J. L. Reed, appearing as attorney for the plaintiff and J. J. Finnegan appearing as attorney for defendants, and after arguments had and the Court being fully advised in the premises,—

IT IS ORDERED that said objections be and the same are hereby overruled.

February, 1916, Term—April 21st—55th Court Day, Friday.

Entered in Court Journal No. 10, page 89. [146]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Bond for Costs on Appeal of Defendants.

KNOW ALL MEN BY THESE PRESENTS,
That the undersigned, Eri Thompson, M. A. Ellis
and J. M. Cummings, the defendants in the above-
entitled cause in the above-named court, as prin-
cipals, by S. O. Morford, their attorney of record in
said cause, and the National Surety Company, a cor-
poration organized under the laws of the State of
New York and authorized to transact the business
of surety in the State of Washington and in the Ter-
ritory of Alaska, as surety, are held and firmly
bound unto J. L. Reed, the plaintiff in said cause,
in the penal sum of FIVE HUNDRED DOLLARS
(\$500.00), lawful money of the United States of
America, to be paid to said obligee, his repre-
sentatives or assigns; for which payment, well and
truly to be made, the undersigned bind themselves
and their respective heirs, representatives and suc-
cessors, jointly and severally, firmly by these
presents.

Sealed with our seals and executed this 19th day of May, 1916.

The condition of this obligation is such, that whereas the above bounded principal obligors have appealed or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree rendered and entered in the above-entitled cause by the above-named District Court for the Territory of Alaska, Third Division, under date of November 18th, 1915.

Now, therefore, if said appellants shall prosecute their said appeal to effect, and if they fail to make their plea good, shall answer all costs, then this obligation shall be void, else valid.

M. A. ELLIS.

By S. O. MORFORD,

His Attorney of Record.

[Seal] NATIONAL SURETY COMPANY.

By G. W. ALLEN,

Resident Vice-President.

Attest: E. P. WELCH,

Resident Assistant Secretary.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 19, 1916. Arthur Lang, Clerk. By Robert L. Wever, Deputy. [147]

*In the District Court for the District of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS and J. M. CUM-
MINGS,

Defendants.

Citation on Appeal.

United States of America,
Territory of Alaska,—ss.

The President of the United States of America, to
the Above-named J. L. Reed, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, State of California, on the 18th day of June, 1916, pursuant to an appeal filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein M. A. Ellis is appellant and you are appellee, to show cause, if any there be, why the judgment rendered and entered by said District Court in the above-entitled cause, on the 18th day of November, 1915, and in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the

United States of America, and the seal of said District Court, this 19th day of May, 1916, and of the Independence of the United States the one hundred and fortieth.

[Seal]

FRED M. BROWN,
District Judge, Territory of Alaska, Third Division.

By ARTHUR LANG,
Clerk of the District Court for the Territory of Alaska, Third Division.

By Robert L. Wever,
Deputy.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 19, 1916. Arthur lang, Clerk. By Robert L. Wever, Deputy. [148]

Affidavit of Service.

United States of America,
Territory of Alaska,—ss.

Anthony J. Dimond, being first duly sworn, says: That on the 23d day of May, 1916, at Valdez, Alaska, he personally served J. L. Reed with a copy of the within Citation, by delivering to said J. L. Reed a true copy thereof.

ANTHONY J. DIMOND.

Subscribed and sworn to before me this 23d day of May, 1916.

[Seal]

GEO. J. LOVE,
Notary Public in and for Alaska.
Commission expires Nov. 25, 1918.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 23, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [149]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS, and J. M. CUM-
MINGS,

Defendants.

Supersedeas Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That we, M. A. Ellis, a defendant in the above-entitled action, as principal, and Hugh Dougherty, of Seward, Alaska, and James A. Stewart, of Seward, Alaska, as sureties; are held and firmly bound unto J. L. Reed, the plaintiff in said action, in the penal sum of Two Thousand Dollars (\$2,000.00), lawful money of the United States of America, to be paid to said obligee, his representatives or assigns; for which payment, well and truly to be made, we bind ourselves and our respective heirs and representatives, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 22d day of May, 1916.

The condition of this obligation is such that, whereas, lately, at a session of the District Court for

the Territory of Alaska, Third Division, holden at Seward, in said division, in an action pending in said court between the above-named obligee J. L. Reed, the plaintiff therein, and the above-named principal obligor M. A. Ellis, the defendant therein, a judgment and decree was made and entered by said Court on the 1st day of December, 1915, in favor of said plaintiff and against said defendant, and said defendant has appealed from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and has given bond as required by law for the costs of said appeal, and has served upon the adverse party a citation duly issued in pursuance of said appeal, and desires now to give a further bond to supersede [150] said judgment and stay the execution thereof until the determination of said appeal, as provided by law—the amount of which supersedeas bond has been fixed, in and by the order made by said District Court in said action on the 21st day of April, 1916, allowing said appeal, at the sum of \$2,000.00;

Now, therefore, the condition of this obligation is such that if said principal obligor, defendant and appellant as aforesaid, shall prosecute his said appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, then this obligation shall be void; else, valid.

M. A. ELLIS. (Seal)

HUGH DOUGHERTY. (Seal)

J. A. STEWART. (Seal)

In presence of:

J. J. FINNEGAN.

S. O. MORFORD.

United States of America,
Territory of Alaska,—ss.

Hugh Dougherty and James A. Stewart, being first duly sworn, each for himself deposes and says: That he is one of the persons named as sureties in and who executed the foregoing bond on appeal; that he is a resident within the Territory of Alaska, and is not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; and that he is worth Two Thousand Dollars (\$2,000.00) the amount specified in said bond as the penal sum thereof, over and above all debts and liabilities, and exclusive of property exempt from execution.

HUGH DOUGHERTY.

JAMES A. STEWART.

Subscribed and sworn to before me this 22d day of May, 1916.

[Seal]

J. J. FINNEGAN,

Notary Public in and for the Territory of Alaska.

Commission expires Aug. 19, 1917. [151]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 22, 1916. Arthur Lang, Clerk. By Robert L. Wever, Deputy.

The above bond approved this 27th day of May, 1916.

[Seal of the District Court]

ARTHUR LANG,

Clerk of the District Court, for the Territory of
Alaska, Third Division. [152]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-49.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON, M. A. ELLIS, and J. M. CUM-
MINGS,

Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, a copy of the record in the above-entitled cause, as a return of the appeal heretofore taken and granted by the defendant, M. A. Ellis, to review the judgment in the above-entitled cause, which record shall consist of the following filed and records, to wit:

1. Amended Complaint.
2. Demurrer to Amended Complaint.
3. Order Overruling Demurrer.
4. Answer.
5. Plaintiff's Exhibits "A," "B," "D," "E,"
"F," "G" and "H."
6. Stipulation Regarding Plaintiff's Exhibit
"C."
7. Copy of Lien Notice of Karl Karlson in S-21.
8. Copy of Judgment in Case No. 233.
9. Copy of Judgment in Case No. S-9.

10. Defendant's Exhibits 1, 2, 3 and 4.
11. Opinion.
12. Findings of Fact and Conclusions of Law.
13. Judgment.
14. Order Granting 90 Days to File Exceptions.
15. Memorandum of Costs and Disbursements.
16. Motion for New Trial.
17. Minute Order Overruling Motion for New Trial.
18. Order Overruling Objections to Costs and Disbursements.
19. Order Extending Time to March 19th, 1916, in Which to File Bill of Exceptions. [153]
20. Order Extending Time to April 15th, 1916, in Which to File Bill of Exceptions.
21. Order Extending Time to April 19th, 1916, in Which to File Bill of Exceptions.
22. Order Extending Time to April 21st, 1916, in Which to File Bill of Exceptions.
23. Petition for Appeal and Assignment of Errors.
24. Order Relating to Assignment of Errors.
25. Order Allowing Appeal and Fixing Bond.
26. Bill of Exceptions and Transcript of Testimony.
27. Certificate of Stenographer.
28. Certificate of Trial Judge.
29. Motion and Objections to Bill of Exceptions.
- 29a. Order Overruling Objections to Bill of Exceptions.
30. Bond for Costs on Appeal.

31. Citation.

32. This Praeceptum.

S. O. MORFORD,

J. J. FINNEGAN,

Attorneys for Defendant Ellis.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 19, 1916. Arthur Lang, Clerk. By Robert L. Wever, Deputy. [154]

*In the District Court for the Territory of Alaska,
Third Division.*

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do *hereby that* the hereto annexed 155 pages, numbered from 1 to 155, inclusive, are a true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that the same is made in accordance with the stipulation of counsel for the parties, respectively.

I further certify that the foregoing transcript has been prepared, examined and certified to *be me* and the cost thereof, amounting to \$44.50, was paid to me by S. O. Morford, attorney for the defendant and plaintiff in error herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court at Valdez, Alaska, this 27 day of May, A. D. 1916.

[Seal] ARTHUR LANG,
Clerk of the District Court, Territory of Alaska,
Third Division. [155]

[Endorsed]: No. 2811. United States Circuit Court of Appeals for the Ninth Circuit. M. A. Ellis, Appellant, vs. J. L. Reed, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

Filed June 9, 1916.

F. D. MONCKTON.

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
United States
Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

M. A. ELLIS, Appellant,

vs.

J. L. REED, Appellee.

Error to District Court
of Alaska, Third Divi-
sion. Hon. Fred M.
Brown, Judge.

Brief For Appellant

EDWARD JUDD and

OTTO E. SAUTER,

Attorneys for Appellant.

620 NEW YORK BLOCK,
SEATTLE

Filed

OCT 13 1916

F. D. Monckton,
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THE FACTS.

Oct. 25, 1909, Eri Thompson, being the owner of the Battle Axe mining claims, on Thunder Creek, in Cook Inlet mining and recording District, in Alaska, conveyed the same by deed to J. M. Cummings, the deed covering other property (a saloon and certain buildings in Susitna) not involved in this case. On Dec. 7, 1911, Cummings sold this mining claim under an optional contract to Al Harper, who in turn transferred this contract to M. A. Ellis, four days later,

on Dec. 11, 1911. This contract called for the payment of \$4,000 Jan. 15, 1912, \$3,000 July 15, 1912, and \$3,000 Sept. 1, 1912. These payments were duly made by Ellis in cash, but not on the exact dates called for, the first being made in February, 1912, the second in August 1912, and the last in Feb., 1913, and he received a deed for the property from Cummings on Feb. 28, 1913. Ellis is then before this court as a *bona fide* purchaser for full value of this property subject only to such liens as the law imposed upon the land at the time of his purchasing.

At the time of Ellis' purchase a decree had been entered by the District Court declaring a certain judgment a lien upon this property, and an appeal therefrom to this Circuit Court of Appeals was pending. On April 25, 1910, J. L. Reed (the same person who is plaintiff in this case) had recovered a judgment, upon claims assigned to him, for \$1598.80 and costs against Eri Thompson and Dave Wallace, on which execution was issued and returned *Nulla Bona*, and a transcript of the judgment filed in the office of the recorder of the Cook Inlet District, May 22, 1910, at 11:10 p. m. the last act making it a lien, under the laws of Alaska, on all realty within the District. On the same day the deed first above described from Thompson to Cummings had been recorded at 8:30 p.

m. having been withheld from the time of its making, Oct. 25, 1909. The decree of the District Court found the deed from Thompson to Cummings void as to the creditors of Thompson, and declared Reed's judgment a valid lien upon the property. Ellis had the title examined by his attorney, S. O. Morford, who had procured an abstract, and finding this defect it was protected against by leaving \$2,500 of the first payment of \$4,000 in Morford's hands to discharge the judgment in case it should finally be sustained as a lien upon the property. Ellis promptly took possession of the mining claim and began to work it and has done so ever since. When the decree was affirmed by this court, Morford paid the judgment out of the money left in his hands. Such is the title of Ellis as an innocent purchaser for value, and he is entitled to be protected to the fullest extent.

Now let us look at the facts constituting the plaintiff's claim. In August, 1912, William Snook and Karl Karlson commenced suits against Thompson and Wallace for labor performed in 1907 on the Battle Axe mining claim. J. L. Reed was substituted as plaintiff in the Karlson suit and recovered judgment July 14, 1914 for \$882.30 and costs, and on the same

day Snook recovered judgment for \$582.30 and costs and such judgment was assigned to Reed. These judgments were rendered, in fact the suits were started long after Ellis had purchased the land, and was in possession of the same and working it. On September 22, 1912, attachments were issued in these two suits, and levied upon the mining claim in controversy by the posting of notices of levy upon the land in question. In reference to the creation of liens upon realty by the levy of attachments, the Compiled Laws of Alaska, Sec. 974, provide as follows:

“If real property be attached, the marshal shall make a certificate containing the title of the cause, the names of the parties, a description of such real property, and a statement that the same has been attached at the action of the plaintiff, and the date thereof. Within ten days from the date of the attachment, the marshal shall deliver such certificate to the commissioner as ex-officio recorder of the recording district in which said real property is situated, who shall file the same in his office and record it in a book to be kept for that purpose. When such certificate is so filed for record the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment, but if filed afterwards it shall only attach, as against third persons, from the date of such subsequent filing.”

No certificates of attachment were ever filed in the

recorder's office of the District in which the land was located, and so the attachments never became liens upon the land.

It was sought to charge the purchaser Ellis with actual notice of the attachments, but the proof failed dismally on that subject. Ellis did not know what was the nature of the suit, subject to which he bought, save that it was to assert a claim for wages. In 1912, long after he had bought the land, made his first payment of \$4,000, and was in possession and working the same, one of the claimants, Snook, wrote Ellis stating he had a claim for wages and asking how he (Ellis) was to pay for the land. Ellis wrote to him telling him the facts and advising him to bring suit to protect himself. A man who was on the land after the attachments were levied told Ellis about the posting of some notice but could not tell what it was except it was some kind of a suit against Thompson and Wallace. Thereupon Ellis promptly wrote to the Recorder who informed him that nothing had been filed against his land. His lawyer, Morford, was also informed about it, and also wrote to the Recorder and received the same information. On such evidence the court held that Ellis had actual notice of the claims of Snook and Karlson, and that they became charges upon the

land without any compliance with the statute regulating the lien of attachments.

ASSIGNMENT OF ERRORS.

I.

The Court erred in entering a decree holding the deed from Thompson to Cummings void as to creditors.

II.

The Court erred in declaring the judgment of Reed upon the claims of Snook and Karlson to be liens upon the land involved in this case.

III.

The Court erred in not dismissing the action at plaintiff's cost.

ARGUMENT.

I.

THE PLAINTIFF HAS NO STANDING IN
COURT TO BRING THIS SUIT.

This is a creditor's bill brought by Reed,

the holder of two judgments against Thompson to subject to the lien of those judgments certain land which Thompson had conveyed to one Cummings, and Cummings had conveyed to the defendant Ellis, who was an innocent purchaser for value, and took immediate possession of the land upon purchasing the same. Reed can not claim that the judgments themselves are any charge upon the land because the judgments were not rendered until long after Ellis had fully performed all the terms of his contract to purchase *and received a deed to the property from Cummings*, consequently Reed seeks to have these judgments declared liens upon the land by virtue of attachments issued and levied upon the land at the beginning of the suits in which the judgments were obtained. These suits were not begun until long after Ellis had purchased the property, paid large sums of money thereon, and taken possession thereof. The returns of the officer show the attachments to have been levied upon the land by posting of notices thereon, but no certificates of such levies were filed in the office of the recorder of the Mining District as required by the statute above set forth to make the levies of such attachments liens upon the land, and notices to third persons. Liens of this character

were wholly unknown to the common law and can only exist by virtue of a strict compliance with the statutes creating them. It is an elementary principle of law that where such liens are to be created in a certain method prescribed by statute that the provisions of the statute must be literally followed and otherwise no lien can come into existence and attach to the property. This is the rule of construction always applied, even where the language of the statute only prescribes a procedure without stating that it shall be the sole means of accomplishing the result. But in this case the statute expressly negatives the acquiring of a lien in any other possible manner by stating that such lien "Shall *only* attach, as against third persons, from the date of such subsequent filing." The very law which creates these liens expressly negatives the idea of the Court supplying any substitute therefor. The Court's holding that actual knowledge by Ellis of the rights upon which Reed might have obtained the liens, if he had followed the method provided by statute, excuses Reed from following the statutory method and still gives him a lien, is certainly far fetched. It is not possible to find any authority that a Court of Equity under its powers can create a "Near Lien" as a substitute for a "Real Lien" which shall have equal

vitality. Therefore Reed by virtue of his attempts at attachments obtained no liens upon the property nor any specific interest therein, regardless of the fact that even if he had, it would have been subject to the previously acquired rights of Ellis, an innocent purchaser for value without notice. As Ellis never came in contact with or had any dealings of any nature with Reed or his assignors in connection with the subject matter out of which arose the causes of action upon which the judgments were based, there was absolutely no privity between them and no facts existed out of which a Court of Equity could create a claim against the land belonging to Ellis at the time the suits were started. The judgments are not against Ellis but against the grantor of Ellis's grantor. The plaintiff Reed has therefore no claim of any kind against Ellis personally, nor any specific interest in the land in question which he can enforce in this suit.

II.

THE JUDGMENTS DECLARED IN THIS SUIT TO BE LIENS UPON THE PROPERTY ARE NULLITIES.

At the time of the bringing of the suits upon the claims of Snook and Karlson, now owned by Reed,

the defendants to those actions, Thompson and Wallace, were both outside of Alaska and no personal service of process upon them was had within the territory. Therefore, as judgments *in personam* against Thompson and Wallace they are absolute nullities. As actions *in rem* these judgments are also invalid. The *rem* in this case was the real estate in question. The Court had no jurisdiction to bring in the defendants constructively by publication until it had obtained jurisdiction over the *rem* in such manner as the laws of Alaska provided, and until that was done the proceedings would not be due process of law. Now the statutes of Alaska expressly provided that attachments on real property should be levied by the officer's posting notices upon the property and then he is commanded by the statute, which we have quoted at length, to make out a certificate showing the levy he has made, and within ten days deliver the same to the recorder to be filed. The statute provides that when such certificate is filed the lien of the attachment shall become fastened on the land from date of issue of the attachments and that in case such certificate is filed more than ten days after the levy it shall only become operative from the date of filing. This filing of the certificate is just as necessary a step for the Court to impress

its attachment upon the land and thus bring the land before it, as the posting of the notice. The marshal having failed to file any such certificate never took the steps necessary to bring the land before the Court and within its control. Therefore no *rem* was before the Court, jurisdiction over which would form a proper basis for constructive service upon the defendants so as to bind their interest in the land. These judgments therefore were absolute nullities as to both Thompson and Wallace. And if they were not binding upon those who were actually parties, how much less can they bind the interest of persons who, like Ellis, were not even nominally made parties to the suits. Moreover, the legal title to the land had for more than two years been out of Thompson, the defendant in such action, and in one J. M. Cummings, who was not made a defendant to such actions, and during the latter portion of that time the same was in the actual possession of Ellis as a purchaser, and his possession was notice to the world of his rights.

III.

NO EVIDENCE WAS OFFERED ON WHICH
TO SET ASIDE THE DEEDS FROM THOMP-
SON TO CUMMINGS, AND CUMMINGS TO
ELLIS.

In order to declare the judgments in question a lien upon the land it was necessary for the Court below and it did find and decree that the deed from Thompson to Cummings was made in fraud of Thompson's creditors, and that Ellis obtained his contract and deed with notice of such fraud. Passing by for the moment the question of notice to Ellis, which we take up later, we insist that there was not one scintilla of legal evidence offered in this case to show that the deed from Thompson to Cummings was fraudulent. Not a witness testified to any facts tending to show such fraud nor were any documents of any kind offered to establish such fact except the decree in the case of Reed vs. Thompson in the action where the District Court entered a decree, afterwards affirmed by this Court, finding the deed from Thompson to Cummings voidable by creditors and adjudicating a certain judgment to be a lien upon the land. When this decree was offered in evidence it was objected to, and when it was admitted an ex-

ception was taken. When Ellis was about to become a purchaser of the property in question he was chargeable with notice of this decree declaring this lien, because the same appeared upon the records, but he was only chargeable with knowledge of it in so far as the relief which it granted affected the title to the land he was buying. How it was obtained he was not chargeable with, as he was not either a party or a privy to the action. The relief granted by the Court was all that concerned him and the facts passed upon by the Court in arriving at conclusions in no manner concerned him. Any judgment or decree is binding only on those who are before the Court. It is true that the decree in this case, in general language, declared the deed from Thompson and Cummings void as against the creditors of Thompson, but the declarations of a decree or judgment are but empty language as against all save those who are before the Court. It can not possibly be claimed that Ellis was in any manner a party to or bound by this decree so that the same would be *res judicata* as to him in reference to any fact that the Court decided or passed upon, except the relief it granted which would affect property he was about to purchase. This Court in its opinion in that case states that the evidence upon which the decree is based is rather

dubious, but still sufficient so that the Court would not disturb the finding of the trial judge. There could be no better illustration of the reason for the doctrine of *res judicata* than this case. Had Ellis been present at the trial of that case and interested therein the result might have been entirely different, but he never had his day in Court in that proceeding, and what was there done is certainly not binding on him in this proceeding, and still that decree *inter alios* is the only evidence offered in this case against Ellis to establish fraud in the making of the deed by Thompson to Cummings. At first glance, as Reed appears to be the plaintiff in both cases, it might appear as though there was some connection between the two, but in each case he was the assignee of the claims of other persons who had no connection with each other. If this Court will read the opinion of the trial judge in this case it will see at a glance that the whole of his decision is based upon the erroneous conception that there was some similarity between the facts in the case where the judgment was obtained on which the first suit was brought to set aside the deed, and the facts in the cases in which the judgments were rendered on which the deed was set aside in the case at bar. In reality there is no resemblance whatever. Thompson and

Wallace are the defendants named in both cases. Reed is the nominal plaintiff in both, but he is the assignee of the claims of different persons, who had absolutely no connection with each other. In the first case a judgment was obtained against Thompson and Wallace based upon personal service of process within the jurisdiction of the Court. In the second case no actual service was ever had upon them, nor was the constructive service against them valid because the *rem* involved in the action had not been brought before the Court in the statutory manner. In the first case the judgment declared to be a lien upon the land was undisputedly a valid lien because it was a final judgment, and by force of the statute became a lien, as soon as filed with the recorder, upon property in the district. In the second case there is no lien upon the land in question because the attachments upon which it was supposed to be predicated were never made liens in accordance with the provisions of the statute. In the first case it was sought to have the deed from Thompson to Cummings held invalid as against the parties to the instrument. In the second case it is sought to have that deed and the other deed from Cummings to Ellis held invalid as against an innocent purchaser for value.

IV.

ELLIS HAD NO KNOWLEDGE NOR NOTICE
OF ANY RIGHTS OF SNOOK AND KARL-
SON OR THEIR ASSIGNEE, REED.

As we have above shown, Ellis did not at the time of his purchase have any legal record notice of the existence of any right of Snook and Karlson, whose claims are represented by the judgments which Reed obtained as their assignee, and which have in the case at bar been declared a lien upon the land. The Court below held that he had actual knowledge of such rights, which was certainly an erroneous finding. If he had had knowledge it would not in any manner have affected his rights, because he would have a personal right to rely upon the public records as he found them, and was not bound, even if he had knowledge thereof, to pay any attention to these men's claim for wages, and thus become chargeable with notice of suits *which they might afterwards bring*. We request this Court to read the testimony of Ellis and his attorney, Judge Morford, in full, as it appears in the transcript, and the Court will become satisfied that Ellis never had any knowledge of any claims against the property which he was pur-

chasing, and that even when he afterwards heard of legal proceedings both he and his attorney promptly exercised the highest diligence in order to protect him against such proceedings. There is not a scintilla of evidence that Ellis knew anything about or ever heard of Snook and Karlson and their claims at the time he bought this property, paid his money upon it and took possession. His is the only testimony upon the subject. Any Court that will read his evidence will believe his statements absolutely, for he was a fair and frank witness, who stated without hesitation just what he knew, however much it might militate against him. In reference to the decree of Court declaring Reed's first judgment a lien upon the land he states that he only knew that there were some claims for wages which it was claimed were chargeable against the land and that sufficient of the first money paid by him was deposited with Judge Morford to protect against such claims. He left the matter to his attorney and knew nothing of the personality of the parties nor the basis of their rights except that they were claims for wages.

After he had bought the land and taken possession thereof Snook wrote him a letter and told him he had a claim for wages for work done upon the land. Ellis, knowing that there was money to cover

similar claims but knowing nothing of the details, wrote and told Snook about the matter and advised him to start proceedings to protect his rights. Ellis went further than that, and in a frank, honest and generous way, he told Snook how he was obligated to pay for the land and gave him such information that if Snook had been diligent he could have begun action promptly and got his money by garnishment. The fact is that the claims of Snook and Karlson could both have been collected if Reed when he started the suits for their claims had garnished the balance of the unpaid purchase price remaining in Ellis's hands, but Reed as a lawyer bungled the matter and instead of going after the cash saw fit to try and make a levy of attachments upon the land in suits against Thompson, when he well knew that Thompson had not had any interest in the land for some years. The money in Ellis's hands could have been easily reached but as long as steps were not taken Ellis had to apply it where his contract called for. Certainly this statement of Snook to Ellis that he had a claim for wages for work done on the property and asking Ellis to give him information to help him collect his claim did not throw the burden of paying that claim upon Ellis or make it a lien upon the land. It would indeed be a simple matter if who-

ever did work connected with certain land could obtain a lien upon such land by going around and telling a man who had purchased it that such a claim existed; and still it is by such means that the Court below charges Ellis with knowledge of defective attachments subsequently sued out and assumes to make that knowledge take the place of compliance with statutory requirements. The next information received by Ellis was when a man who had been to the land told him that there were notices stuck up on the land showing some kind of a law-suit against Thompson and Wallace but not informing him that they were attachment notices or what their exact nature was. The law provided that if attachments were levied, then within ten days after such attachments were levied certificates of levy must be filed in the recorder's office. Ellis, with little knowledge of the subject except that the recorder's office was the place to find out about titles of land, wrote to the recorder and received an answer that there was nothing against the land on the records, and in doing this he showed the highest degree of diligence. He communicated his information about these notices on his land to Judge Morford, and this gentleman also wrote to the recorder and received the same information. Both exercised the highest degree of

diligence to ascertain if there was anything that would injure Ellis's title to the land, while Reed in failing to have the marshal file certificates of levy was guilty of the grossest negligence. Two years afterwards, in July, 1914, Reed procures judgments on the Snook and Karlson claims, and then for the first time by the starting of the case at bar Ellis is informed of what the Snook and Karlson claims are, that they had obtained judgment on them, and had made a defective attempt to levy upon his land, but had negligently failed to complete their levies, so that when he had made inquiry he could not find out about them. The evidence in this case shows the grossest kind of negligent bungling on the part of Reed in conducting his case. First, with the knowledge he had he should have garnished the last payment which Ellis would have had to make, and second, having chosen to attach he should have seen to it that the attachments were legally made.

We have been arguing this matter upon the theory that it would have made some difference if Ellis had had knowledge or notice of these claims and proceedings. But we wish to again emphatically insist that even if he had it could not have affected him as a previous innocent purchaser for value. The Court below in his opinion throws upon Ellis the

duty of inquiry to find out about claims of which there is no trace upon the records, and excuses Reed for the grossest negligence. The evidence of Ellis and Morford affirmatively shows that they did not have any knowledge or notice of the claims of Snook and Karlson or their assignee, Reed.

V.

THE TRIAL COURT'S HOLDINGS.

In effect the Court below has held the following propositions:

1. That a statutory lien can be created without complying with the statute.

2. That the findings of a decree are binding on a person who is neither a party nor a privy to the suit.

3. That a person by writing a letter to one who has purchased land and informing the purchaser that he has an unliquidated claim against the previous owner, can acquire a lien upon the land to secure his claim.

4. That the owner of land who examines the records where by law claims against land should be

shown and finds none, will not be protected by such examination.

5. That judgments spread upon the records of a court which show that neither person nor property had been brought before the court by legal process are nevertheless valid and effective.

6. That a bona fide purchaser, for value, and without notice, will not be protected.

CONCLUSION.

We have not cited any authorities to the Court, because all the propositions of law that we have invoked are elementary, and the Judges of this Court have enunciated them so often that it would be impertinent to assume lack of familiarity with them. It is only a matter of their application to the facts shown in this record. We insist that this cause should be reversed and remanded with instructions to dismiss the suit.

Respectfully submitted,

EDWARD JUDD and

OTTO E. SAUTER,

Attorneys for Appellant.

No. 2811

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

M. A. ELLIS,

Appellant,

vs.

J. L. REED,

Appellee.

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION

J. L. REED.

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Attorneys for Appellee.

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THIRD DIVISION

STATEMENT OF THE CASE.

This is an appeal from the District Court for the Territory of Alaska, Third Division. The proceeding which this court is called upon to review was an equitable action brought by the appellee against the appellant and Eri Thompson and J. M. Cummings. In the court below appellee was adjudged to have a valid lien by virtue of the levy of attachments in Causes S. 20 and S. 21 upon a certain placer mining claim known as the Battle Axe, located on Thunder Creek, in the Cook Inlet Mining and Recording Precinct,

Territory of Alaska; that said lien commences and dates from the 22nd day of September, 1912; that the purported conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings was made with intent to hinder, delay and defraud the creditors of said Thompson of whom appellee is one, and to it set aside so far as the same conflicts with plaintiff's lien and rights and is inferior thereto; that the conveyance dated the 28th day of February, 1913, between J. M. Cummings and M. A. Ellis was accepted by the grantee with notice and knowledge of the fraud affecting its validity and with notice and knowledge of plaintiff's liens and equities by virtue of his judgments, attachments and levy of attachments in said causes, and that plaintiff proceed to the sale of said property under execution.

In cause S. 20, entitled Wm. C. Snook vs. Eri Thompson and Dave Wallace, co-partners, plaintiff recovered judgment for the sum of \$582.68 for work and labor performed as a placer miner on the Battle Axe mining claim in the year 1907. Said judgment was subsequently assigned to appellee J. L. Reed.

In cause S. 21, entitled J. L. Reed vs. Eri Thompson and Dave Wallace, co-partners, plaintiff recovered judgment for the sum of \$822.30 for work and labor performed by plaintiff's assignor Karl Karlson as a placer miner on the Battle Axe mining claim in the years 1906 and 1907.

In both causes writs of attachment were issued and on the 22nd day of September, 1912, levies were made upon defendant's interest in said Battle Axe

mining claim and the return of service filed in the clerk's office of the district court on December 3rd, 1912, and thereafter the certificates of levy were filed in the office of the recorder of the precinct in which said claim is situated, on the 25th day of July, 1914.

On December 7, 1911, said defendant Cummings granted an option to purchase said Battle Axe mining claim to one Al Harper for the sum of \$10,000 to be paid as follows: the sum of \$4,000 on or before January 15th, 1912; the sum of \$3,000 on or before July 15th, 1912, and the further sum of \$3,000, on or before September 1st, 1912. On December 19th, 1911, said Al Harper assigned all his interest in and to said option to M. A. Ellis. The first payment made by Ellis was in February, 1912, of the sum of \$4,000. The second payment of \$3,000 was made in August, 1912. The final payment of \$3,000 was made in February, 1913, and on the 28th day of February, 1913, Cummings executed a deed to Ellis for said Battle Axe mining claim. The receipt showing the first payment of \$4,000 reciting the option contract and its assignment to Ellis was duly filed for record in the recorder's office on the 11th day of March, 1912.

On the issue of appellant's knowledge of the attachment levies upon the ground sought to be charged by this suit with the lien of appellee's judgments appellant testified that in the summer of 1912, before the levies and many months before delivery of the conveyance from Cummings to appellant, he received a letter from Snook, a claimant, who later recovered judgment in one of the attachment actions, which

contention is correct, under the authority of *Dalton vs. Hazelet*, 182 Fed. 561-570, "The absence of a proper bill of exceptions leaves the case open for consideration upon the pleadings, findings of fact, conclusions of law, and decree."

Taking up the assignments of error in order counsel for appellee urge that none of them assigns reversible error even on appellant's view of the case except the averments of error in the findings of fact.

The first assignment of error challenges the order of the court overruling the demurrer of the defendant Ellis to Plaintiff's (appellee's) amended complaint.

Plaintiff pleads that appellant's predecessors in interest, or pretended interest, Thompson and Cummings, arranged a transfer of the property involved from Thompson to Cummings to defraud creditors; that the transfer in question had been declared void for fraud by the district court of Alaska and by this court; that appellant had full knowledge of said fraud and of the litigation; also that he had actual knowledge of appellee's lien on the property by virtue of the attachment levies before he received his deed for the property. These allegations appear to counsel for appellee to state a complete cause of action so explicitly that argument against the demurrer is superfluous.

Appellant's motion for a new trial in the district court, denial of which forms the basis of the eighth assignment of error, if it has any virtue, also appears

to be subject to the fatal objection that it was not filed in time. The decision of the court was filed November 18, 1915. The judgment was filed December 1, 1915; the motion for new trial was filed December 20, 1915. The Alaska code requires a motion for a new trial in a civil case to be filed three days "after the verdict or other decision." When a decision is given in vacation by the court twenty days are allowed for filing a new trial but this decision was given in term time.

Appellant's brief misstates facts when it says (p. 4), "These judgments were rendered, in fact the suits were started long after Ellis had purchased the land, and was in possession of the same and working it."

The real fact is that the actions were started (August, 1912) after Ellis had taken an assignment of an option to purchase given to Harper, but long before final payment of the purchase price was made. The final payment of \$3000 was made and deed delivered February 28, 1913, five months after the levies of attachment upon the land.

Appellant's assertion on page 10 of his brief that the judgments against Thompson and Wallace are invalid even as judgments in rem because the certificates of levy were not filed within ten days wholly misconceives the Alaska law of attachment. The levy is complete when made on the ground as required by law. The certificate is only to give notice to third persons.

The contention of appellant's brief that he is not bound by the attachment is founded entirely upon his construction of the meaning of that part of Section 972, Compiled Laws of Alaska, which reads "When such certificate is so filed for record the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment, but if filed afterwards, it shall only attach, as against *third persons*, from the date of such subsequent filing." Clearly within the contemplation of this statute such *third persons* would not include the defendants, Thompson, Wallace and Cummings, and we contend that it does not include Ellis unless he is a purchaser in good faith and for a valuable consideration without notice of plaintiff's equities.

The statute merely provides a *method of giving notice* of the attachment lien and a compliance therewith is no part of the levy.

Deveney et al. vs. Burton, 35 S. E. 268.

In *Trevis et al. vs. Topeka Supply Company*, 22 Pac. 991, it was held that an attachment levy on real estate is *constructive notice only* to such persons as may acquire subsequent interests in the attached realty from *parties or privies* to the action.

Applying this rule to the present case the levy of attachment on the 22nd day of September, 1912, was constructive notice to Thompson and Wallace and Cummings and both *actual and constructive notice to Ellis* under the facts and circumstances which developed prior to the consummation of his purchase

on the 28th of February, 1913.

The jurisdiction of the trial court is fully upheld by the authority of *Bank of Colfax vs. Richardson*, 34 Or. 518.

As to appellant's second, third, fourth, fifth, sixth and seventh assignments of errors we believe that the theory upon which these assignments are predicated is the same in each instance and relates to the findings, conclusions and judgment of the trial court holding that Ellis had actual notice and knowledge of appellee's liens, equities and rights under and by virtue of his levies of attachments in Causes S. 20 and S. 21 made on the 22nd day of September, 1912, thereby making Ellis' title derived from J. M. Cummings under deed dated the 28th day of February, 1913, recorded on the 28th day of March, 1913, subject and inferior thereto.

Going back of the grounds set forth in his assignments of error appellant's theory of this case at the trial and upon this appeal is based upon his claim of superior equities under deed dated February 28, 1913, and recorded March 28, 1913, to the rights and equities of appellee by virtue of his levies of attachment on September 22nd, 1912, because the deed to Ellis was recorded prior to the recording by appellee of his certificates of levy of attachments. In setting forth this contention appellant avoids the doctrine of actual notice and rejects all facts which taken either separately or collectively would be sufficient even to put him upon inquiry as to appellee's rights and equities. The learned trial judge found against appellant's

contention as to actual notice (R. 63) and in his opinion after reviewing the testimony concludes (R. 70),

“I believe the knowledge which Ellis is shown by his own testimony to have had is such as to bring him within the first named class, that of ‘express knowledge or notice.’”

Compiled Laws of Alaska, Sec. 973, provides:

“From the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property,” etc.

Compiled Laws of Alaska, Sec. 974, provides,

“If real property be attached, the marshal shall make a certificate containing the title of the cause, the names of the parties, a description of such real property, and a statement that the same has been attached at the action of the plaintiff, and the date thereof. Within ten days from the date of the attachment, the marshal shall deliver such certificate to the commissioner as ex-officio recorder of the recording district in which such real property is situated, who shall file the same in his office and record it in a book to be kept for that purpose. When such certificate is so filed for record the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment, but if filed afterwards it shall only attach, as against third persons, from the date of such subsequent filing” etc.

Under Section 973, which is the same as Section 302 B. & C. Comp. of the laws of Oregon and the con-

struction placed thereon by the supreme court of that state appellee's rights under his levies are the same as though he had purchased the Battle Axe mining claim and had not recorded his deed and thereafter Ellis with notice and knowledge of the purchase had also purchased the same mining claim and by reason of being the first to place his deed of record asserted title and superior equities to the former.

In *Boehringer vs. Creighton*, 10 Or. 42, the court says,

“Counsel for respondents suggested at the hearing, that the effect of the terms of this statute places the attaching creditor in as good a position as that of a bona fide purchaser for a valuable consideration, notwithstanding his notice of previous unregistered deeds or other instruments. But we do not think any such construction can be tolerated. It would encourage fraud and uphold injustice, instead of enforcing a rule of right and fair dealing among men. The statute was evidently designed to place him *upon an equal footing*, but not to confer upon him a superior advantage, by protecting him in the enjoyment of the fruits of fraud. The wording of the statute does not demand such a construction, and we can discover no reason or analogy to support it.”

If an attaching creditor stands on an equal footing with and is deemed a purchaser in good faith and for a valuable consideration as to third persons, the same reasons and arguments apply to a subsequent purchaser with notice of a previous unrecorded certificate of levy of attachment, i. e. “it would encour-

age fraud and uphold injustice, instead of enforcing a rule of right and fair dealing among men.”

The same doctrine is reaffirmed in *Dimmick vs. Rosenfeld*, 34 Or. 101, in which Justice Bean says,

“It is claimed, however, that by virtue of Section 150 of the statute (Hill’s Ann. Laws) which is made applicable to levies under execution by Section 283, the defendants’ levy entitles them to the protection accorded to bona fide purchasers for value. But these sections of the statute were simply designed to place an attaching or execution creditor *upon exactly the same footing* as purchasers from a judgment debtor, and not to confer upon them any superior advantages: citing *Rhodes vs. McGarry*, 19 Or. 222, *Meier vs. Hess*, 23 Or. 599; and also affirmed in *Security Trust Company vs. Loewenberg*, 38 Or. 159.

The doctrine finds its basis and is stated in Pomeroy’s Equity Jurisprudence, Vol 1 (3rd Ed.), Sec. 430 in the operation of equity upon the conscience of a party, the latter part of this section reads, “Courts of equity have but added the rule that if the subsequent party, who thus obtains the legal benefit of a record, has notice, his recorded instrument shall be subordinate to the prior unrecorded conveyance of which he was charged with notice. In giving this effect to a notice, the courts of equity do not assume to nullify the provisions of the recording act; they admit that a subsequent grantee has, by means of his record, obtained the complete legal title, which cannot be directly set aside nor disturbed; but they say that the notice of the prior conveyance makes it unconscientious for him to hold

and enjoy that legal title for his own benefit, and they impose upon his conscience the obligation of holding it for the benefit of the prior unrecorded grantee."

In *State of Oregon vs. Cornelius*, 5 Or. 46, the court by Prim J. says, "The only effect of such a levy was to create a lien upon the real property in favor of the party suing out the attachment, from the time of the levy."

In 4 Cyc. 638, the rule is stated as follows:

"The phraseology of some statutes regarding the registration of titles to real estate places an attaching creditor on a par with a purchaser, and in those states a creditor levying an attachment without notice of a prior unrecorded deed is entitled to priority over the grantee under the unrecorded deed; but unless aided by statute the general rule will prevail, and the creditor will be postponed to the unrecorded conveyance." (Citing Oregon cases heretofore referred to.)

In the case of *Raymond vs. Flavel*, 27 Or. 219, p. 247, the court says:

"It is asserted that 'upon proof of the equitable title of plaintiff, a defendant who relies upon the defense of being an innocent purchaser in good faith must set up the *union of the legal title with a superior equity* arising from the payment of the money and receiving the conveyance without notice, and with a clear conscience.'" This doctrine seems to be based upon good authority."

As to the questions of the bona fides, notice and knowledge on the part of Ellis at the time of the ac-

ceptance by him of the deed from Cummings on the 28th day of February, 1913, of appellee's rights and equities by virtue of his levies of attachment on the 22nd day of September, 1912,

In *Coolidge vs. McClaine*, 11 Or. 327, the court Waldo J. says,

"These cases hold that, in such case, constructive notice is not sufficient; that actual notice is necessary to make the grantee a party to the fraud. Actual notice need not be established by direct proof. The fact of notice, or knowledge, may be inferred from circumstances. Under this view of the law, the question to be determined is, did the grantee, in fact, know or believe that the grantor intended to defraud his creditors? On the sound principle and particularly on the wording of the statute, the doctrine of these cases out to be followed."

In *Osgood vs. Osgood*, 35 Or. 1, on p. 16 the court says,

"The knowledge of Neustadter Bros.' touching the plaintiff's equities in the lots makes them guilty of bad faith in the attachments there." Cases cited. "We said in *Raymond vs. Flavel*, 27 Or. 219, 'If a person has actual knowledge of latent equities and purchases notwithstanding, the presumption of *mala fides* is irresistible, or rather, he takes the estate laden with the equities. and stands in no better position than his grantor. The attempt to claim as an innocent purchaser is the fraud of which the equitable owner may complain. '"

In *Jennings vs. Lentz*, 50 Or. 483, it was held, *syllabi*, of case,

1. That an attaching creditor, in order to obtain the rights of a bona fide purchaser, is bound to prove that he in fact acquired his lien in good faith and without notice of outstanding equities.

2. Good faith is an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all belief of facts which would render the transaction unconscientious. A want of that caution and diligence which an honest man of ordinary prudence, is accustomed to exercise in making purchases is, in judgment of law, a want of good faith.

3. Whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of the facts inquiry would have disclosed by the exercise of reasonable diligence."

We think that the doctrine of the case of *Haines vs. Connell*, 48 Or. 472, is conclusive of the law of this case, and if Ellis had notice and knowledge of appellee's equities his rights are secondary thereto. The question involved there was, whether an attaching creditor had notice of the equities of a grantee under a prior unrecorded deed at the time of his levy of attachment. The court below was reversed for the reason that there was no evidence given at the trial by either party concerning a knowledge or want of knowledge of plaintiff's interest in the property by the attaching creditor at the time of the attachment. The principle involved is identical with the case be-

fore the court. The court says,

“The deed from Kane to the plaintiff had not been recorded at the time of the levy of the attachment issued in the action of Schoch vs. Kane, and more than five days has elapsed since the date of its execution, and, therefore, the attachment, if valid, will take precedence over such deed if such attachment was made in good faith and without notice of plaintiff’s rights.” Cases cited.

In the case of Thompson vs. Reed, 202 Fed. 870, wherein other creditors of Thompson brought an action in equity to set aside the deed from Thomas to Cummings dated the 25th day of October, 1909, upon the ground of fraud, being the same deed through which Ellis is now asserting title, this court on the 3rd day of February, 1913, sustained the trial court and held; in the following language,

“The deed from Thompson to Cummings being void for fraud, Reed’s judgment became a lien upon the real property described in the deed upon the recording of the judgment in the office of the recorder of the district in which the property is situate, by virtue of the statute of Alaska (Section 260, Pt. 4, Carter’s Codes), which reads as follows; etc.”

The claims of the creditors of Thompson now before the court were contemporaneous with and of a similar character to those litigated in cause reported 202 Fed. 870, being for labor and work performed on the Battle Axe mining claim in 1906 and 1907.

The assignments of error seek a reversal of the court below upon the determination of a question of

fact respecting which subject this court in *Tobey vs. Kilbourne*, 222 Fed. 760 held,

“It is the established rule that the findings of the trial court in a suit in equity must be taken as presumptively correct, and that unless an obvious error has intervened in the operation of the law, or some serious or important mistake has been made in the consideration of the evidence the findings will not be disturbed by the appellate court.”

Regarding some of the facts offered in evidence at the trial which the court below deemed sufficient to charge Ellis with notice and knowledge of appellee's rights and equities the court's attention is directed to the following:

The same attorney, S. O. Morford, who acted throughout for either Thompson or Cummings at the trial and appeal of cause entitled *Thompson vs. Reed*, 202 Fed. 870, represented Ellis at the trial of this cause and testified in his behalf.

Karl Karlson one of the claimants filed a lien on the mining ground in question April 29, 1907, but did not bring suit within six months thereafter (R. 34). July 14, 1912, Wm. C. Snook wrote Ellis of his claim. August 10th Ellis answered Snook's letter and advised him to sue and get judgment (R. 30 and 31). In August, 1912, both Snook and Carlson commenced separate actions against Thompson and Wallace, co-partners, and on September 22, 1912, caused levies of attachment to be made on the Battle Axe mining claim (R. 28, 29). On December 19, 1911, Ellis took an assignment from Al Harper of the latter's option

to purchase the Battle Axe mining claim (R. 42, 43 and 44), and made his first payment of \$4000 in February, 1912, at which time he knew of the pendency of the cause of Thompson vs. Reed on appeal (R. 144).

Q. When did you make your second payment?

A. I made the second payment, I think it was the second of August—it was before I came out; I sent out gold dust; made it at the Bank of Seward (R. 114 and 115).

Q. At the time of the final payment did you receive a deed to the property?

A. Yes, sir.

Q. Was it at that time you made the payment?

A. Yes sir (R. 116).

Q. At what time?

A. I think it was in February, 1913, I ain't certain about that date.

Ellis was in possession of the mining claim in 1912 and left for Seward, September third, 1912 (R. 122 and 123).

“Q. You knew that some kind of a paper had been posted on the cache in 1912?

A. Yes sir.

Q. About what month was that?

A. That was in October.

Q. Did you take any steps to ascertain what that paper was?

A. Yes sir.

Q. What did you find that paper to be?

A. They told me that it was a suit started by Snook against Wallace and Thompson.”

Ellis states under oath that he had no knowledge

that an attachment had been levied on the Battle Axe claim when he came to Seward in October, 1912. Let us examine the probabilities of that statement being true.

“A. Absolutely nothing. I came to Judge Morford and asked him if he knew about it, and had him *call up the office at Valdez*, while I was here, the two or three days I was waiting for the boat and he couldn't find out anything for me, what the papers were at all and I didn't know until I heard from up there that it was a suit started against Thompson and Wallace.” (R. 124).

Calling up the office at Valdez from Seward has reference to the subject of Exhibit (R. 62) Letter October 8, 1912, Lakin to Morford.

“In compliance with your *telegram* of this date, I enclose herewith a certified copy of the complaint in cause S. 20.

As there has been no return of the *Writ of Attachment*, I am unable to send certified copy of that or the return.”

Defendant's Exhibit 4, Morford acknowledges receipt of the copy of the complaint in Snook vs. Thompson suit, and adds, “As soon as you receive return of attachment, please send me a copy of the writ and the return, *as I am informed an attachment has been placed upon the property at Sasitna.*” (R. 61).

This letter Morford identifies is his redirect examination on (R. 148 and 149).

Can knowledge be more direct and complete than this? Ellis had Morford call up the clerk's office at Valdez and in compliance therewith Morford requests

a copy of the complaint and states that he had been informed that an attachment had issued, at the time Ellis was in Seward with knowledge of a suit commenced by Snok and that some paper had been posted upon the Battle Axe mining claim.

S. O. Morford testified (R. 142).

“Q. The question was did you and Mr. Ellis talk about these Snook and Carlson claims when he came out in the fall of 1912?

A. I think it was mentioned, yes.

Q. Did he tell you that Arthur Meloche had told him about the notice being posted on the cache house?

A. It is hard to remember exactly but I almost feel as if Meloche and Ellis were both at my office.

Q. And you talked it over?

A. Yes sir.”

The opinion of the trial court states the facts regarding appellant's knowledge of the fraudulent character of the deed to Cummings as follows:

“His own testimony clearly shows that he knew of the action pending to declare said deed from Thompson to Cummings void; that he paid over a considerable portion of the purchase price owing to Cummings to a trustee, to be held pending the final determination of said action, and that when said action was finally determined adversely to Cummings, said money was paid to the plaintiff Reed in satisfaction of the former judgment” (R. 66).

Further on the same page the court in its opinion summarizes the admissions of appellant of correspondence with Snook, one of the claimants whose

claim forms part of the basis of this suit, regarding that claim. The testimony to which the court refers is found on pages 114-5-6 of the record.

The law of notice so far as it affects the issue in this case seems to plaintiff to be clearly defined and settled. The following statement seems to be all-inclusive of the issue here:

“Notice, in its legal sense may be defined as information concerning a fact actually communicated to a party by an authorized person, or actually derived by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge.

“It is a general rule that whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding.” 29 Cyc. 1113-4-5.

Cases laying down the rule just quoted are so numerous that they can be gathered at random, all stating the principle in similar language, such as the following:

“One is bound by actual knowledge, or actual notice of such facts and circumstances as by the exercise of due diligence would lead to knowledge of another’s title to land; or where his ignorance is the result of gross and culpable negligence he is equally bound.” *Simmons Creek Coal Co. vs. Doran*, 142 U. S. 417.

“Where one is put on warning, and makes no inquiry, he is charged constructively with

knowledge of those facts which a reasonable investigation would have disclosed to him." *Parker vs. Parker*, 56 Atl. 1094 (New Jersey).

"Where one has knowledge of facts sufficient to excite the attention of a person of ordinary prudence and put him upon further inquiry, he is required to make such inquiry with good faith and with diligence; and, in the absence of so doing, he will still be chargeable with knowledge of the particular point or fact which such inquiry would have revealed." *Webb vs. John Hancock Mut. Life Ins. Co.*, 69 N. E. 1006 (Indiana).

In the opinion of the trial court, which appears on pp. 63-70 inclusive of the record, ample authority is cited, not necessary to repeat here, to the same effect as the foregoing. The court found that the facts of this case clearly charged appellant Ellis with such actual knowledge as fastened upon him imputed knowledge of the pending actions and attachments with all the legal responsibility such knowledge entailed, as well as of the previous litigation which secured from this court, affirming the district court of Alaska, a decision holding the deed from Thompson to Cummings to have been fraudulent and void as to creditors. The opinion says:

"It would thus seem that Ellis, while not chargeable with the constructive notice provided for in Section 974, that is, by the filing of the certificates of the attachment in the recorder's office, had actual knowledge of the whole affair—of the attack on the deed from Thomas to Cummings; the suit then pending on appeal; the fact that

Snook had a claim for wages against Thompson for work on said ground in 1907, for which he himself had advised Snook to bring suit and get judgment; and such notice of posting on the ground, in view of all the circumstances in this case, was not only sufficient to put him on inquiry, but brought home to him actual notice of plaintiff's rights" (R. 67-68).

This summary appears to counsel for appellee to state the vital facts of the case and to justify the judgment.

The ninth assignment of error is that the court erred in overruling defendant Ellis' objection to the allowance of attorney's trial fee of twenty dollars.

Compiled Laws of Alaska, Sec. 1341, provides:

"The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action of defense thereto, which allowances are termed costs."

Counsel for appellee respectfully submit that the record discloses no reversible error and that the judgment of the district court of Alaska should be affirmed.

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